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Sup[illegible] United States

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WILL[illegible], JR., ANN [illegible]MOREST AND CA[illegible] BY GERA[illegible]D P. CULKIN, THE[illegible], APPELLANTS,

[illegible]

CITY [illegible] TRUST COMPANY, AS TRUS[illegible] THE WILL OF HENRY C. W[illegible] ET AL.

A[illegible] SURROGATE'S COURT, NEW YORK COUNTY, [illegible] OF NEW YORK

[illegible]

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 52

WILLIAM J. DEMOREST, JR., ANN DEMOREST AND CAROLYN DEMOREST BY GERALD P. CULKIN, THEIR SPECIAL GUARDIAN, APPELLANTS,

vs.

CITY BANK FARMERS TRUST COMPANY, AS TRUSTEE UNDER THE WILL OF HENRY C. WEST, DECEASED, ET AL.

APPEAL FROM THE SURROGATE'S COURT, NEW YORK COUNTY, STATE OF NEW YORK

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., AUGUST 16, 1943.

[fols. 1-4]

IN SURROGATE'S COURT, COUNTY OF NEW YORK

File No. P1379—1934

In the Matter of the Judicial Settlement of the Account of Proceedings of City Bank Farmers Trust Company as Trustee of the trusts created under the Last Will and Testament of Henry C. West, Deceased, and of Application of City Bank Farmers Trust Company as Trustee as aforesaid, for a Determination as to the Construction and Effect of said testator's Last Will and Testament, and for Instructions and Directions as to the Manner and Method of Allocation and Distribution of the Funds which are now or may hereafter be in its hands as Trustee as aforesaid.

Notice of Appeal of Infant Appellants, William J. Demorest, Jr., Ann Demorest and Carolyn Demorest

Sirs:

Please take notice that Gerald P. Culkin, as Special Guardian for William J. Demorest, Jr., Ann Demorest and Carolyn Demorest; respondent in the above-entitled action, hereby appeals on the law and on the facts to the Appellate Division of the Supreme Court of the State of New York, First Department, from each and every one of the provisions of the decree in the within proceeding construing [fol. 5] the Will of the above-named deceased and settling the account of proceedings of City Bank Farmers Trust Company as Trustee of the trusts created under the Last Will and Testament of Henry C. West, deceased, which decree was dated the 8th day of September, 1941, and made and entered herein in the office of the Clerk of this Court on the 9th day of September, 1941, and that said respondent, Gerald P. Culkin, as Special Guardian as aforesaid, appeals from the whole and every part thereof except so much thereof as determines the true meaning and construction of the Fifth clause of the Last Will and Testament of the above-named deceased and directs the disposition of the income from the trust created under said clause, to wit: paragraphs "1." to "4." thereof and except so much thereof as fixes the amount and directs the payment of costs, dis-

bursements, fees and allowances to counsel and special guardian.

And Please Take Further Notice that the appellant having appealed upon the facts will request the Court to exercise its powers under section 309 of the Surrogate's Court Act.

Dated: New York, October 11th, 1941.

Yours, etc., Gerald P. Culkin, *Special Guardian for Respondents William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, Infants,* Office and P. O. Address, 29 Broadway, Borough of Manhattan, City of New York.

[fols. 6-10] To Mitchell, Taylor, Capron & Marsh, Esqs., *Attorneys for Petitioner,* 20 Exchange Place, New York City., Larkin, Rathbone & Perry, Esqs., *Attorneys for Emma M. West,* 70 Broadway, New York City. Butler, Wyckoff & Reid, Esqs., *Attorneys for Marie Elizabeth West Jones and Elizabeth Francis Jones,* 165 Broadway, New York City. George Loesch, Esq., *Clerk of the Surrogate's Court,* County of New York.

[fol. 11] In Surrogate's Court, County of New York

[Title Omitted]

Decree Construing Will and Settling Account—Sept. 8, 1941

City Bank Farmers Trust Company (formerly known as The Farmers' Loan and Trust Company) having heretofore on or about the 2nd day of December, 1940, filed an intermediate account of its proceedings as trustee under the last will and testament of Henry C. West, deceased, and [fol. 12] having also presented a petition praying that said account be judicially settled and allowed, that the court determine the construction and effect of the Fifth clause of said will as to whether after the death of Zimri West, Emma M. West is entitled to the entire income of the trust created pursuant to the said clause during her life or until she shall remarry, and that the court construe said will for the purpose of determining what proportion, if any, of the moneys or property received or which may be re-

ceived by way of rents or proceeds of sale of real property acquired upon foreclosure or by deed in lieu of foreclosure of mortgages or on account of claims based upon the guaranty of such mortgages, should be apportioned either to income or principal of the trust estate created by said will and what part, if any, may or should be paid or applied to the use of those persons who now or hereafter may be entitled to receive or have applied to their use the income of said trust estate, and that petitioner be instructed with respect to the proper method under the true construction of said will which should be employed in computing the net rents received from such or similar properties and the proper method of apportioning between principal and income such net rents, proceeds of sale of said properties or similar properties which may be hereafter acquired by said petitioner and of any moneys received or which might be received on account of any claims based upon such guaranties, and a citation having thereupon been duly issued pursuant to statute directed to all the persons interested in the said trust created under said last will and testament of Henry C. West, deceased, citing and requiring them and [fol. 13] each of them to show cause before the Surrogate's Court of the County of New York, to be held at the Hall of Records, in the Borough of Manhattan, City, County and State of New York, on the 3rd day of January, 1941, at 10:30 o'clock in the forenoon of that day why said account should not be so judicially settled and allowed and said will should not be construed as prayed for in the petition and petitioner should not receive instructions as prayed for in said petition; and an order bearing date the 2nd day of December, 1940, having been duly made and entered herein on or about December 9, 1940, designating Gerald P. Culkin, Esq., counsellor-at-law, of 31 Nassau Street, City of New York, to receive service on behalf of William J. Demorest, Jr., and Ann Demorest, infants over the age of fourteen years, and Carolyn Demorest, an infant under the age of fourteen years; and the said citation having thereupon been returned with proof of due service thereof on Zimri West, 3rd, individually and as an heir-at-law and next-of-kin of Zimri West, deceased, Marie Elizabeth West Jones, individually and as an heir-at-law and next-of-kin of Zimri West, deceased, Elizabeth Frances Jones, Dilys Demorest, William J. Demorest, Jr., Ann Demorest, Carolyn Demo-

rest, Gerald P. Culkin, Esq., the person designated to receive service of the citation herein on behalf of William J. Demorest, Jr., and Ann Demorest, infants over the age of fourteen years, and Carolina Demorest, an infant under the age of fourteen years, and Emma M. West having appeared herein by her attorneys, Messrs. Larkin, Rathbone & Perry, pursuant to authorization duly acknowledged and filed herein, and Marie Elizabeth West Jones and Elizabeth Frances Jones having appeared herein by their attorneys, [fol. 14] Messrs. Butler, Wyckoff & Reid, pursuant to authorization duly acknowledged and filed herein, and said petitioner having duly appeared on the return day of said citation by Messrs. Mitchell, Taylor, Capron & Marsh, its attorneys, and said Emma M. West having duly appeared by her attorneys, Messrs. Larkin, Rathbone & Perry, and Marie Elizabeth West Jones and Elizabeth Frances Jones having duly appeared by their attorneys, Messrs. Butler, Wyckoff & Reid, and none of the other respondents herein having appeared, and Gerald P. Culkin, Esq., having been duly appointed special guardian for the infant respondents, William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, and having duly filed his consent to act herein, and City Bank Farmers Trust Company having duly rendered an account of its proceedings as trustee under the last will and testament of Henry C. West, deceased, to and including the 31st day of July, 1940, under oath before the said Surrogate and said account having been filed and said Gerald P. Culkin, Esq., having duly made and filed his report as special guardian herein duly verified on the 16th day of January, 1941, wherein objections numbered I to VI to said account were interposed, and said respondent, Emma M. West, by her attorneys, Messrs. Larkin, Rathbone & Perry, having made and filed objections numbered 1 to 15 to said account; and the matter having duly come on to be heard before the said Surrogate on the 17th day of January, 1941, and said petitioner, City Bank Farmers Trust Company, having duly appeared on said hearing by its attorneys, Messrs. Mitchell, Taylor, Capron & Marsh, C. Alexander Capron, Esq., and James K. Taylor, Esq., of counsel, the respondent, Emma M. West, having duly ap- [fol. 15] peared by her attorneys, Messrs. Larkin, Rathbone & Perry, Albert Stickney, Esq., of counsel, and the respondents, Marie Elizabeth West Jones and Elizabeth Frances Jones having duly appeared by their attorneys, Messrs.

Butler, Wyckoff & Reid, James Morrow, Esq., and also James L. Handford, Esq., of the New Jersey bar, of counsel, and the infant respondents, William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, having duly appeared by their special guardian, Gerald P. Culkin, Esq.; and the matter having been duly argued by counsel for the respective parties hereto and due deliberation having been had and the said Surrogate having rendered and filed his decision in writing herein, published in the New York Law Journal on the 3rd day of February, 1941, construing the Fifth clause of said last will and testament of Henry C. West, deceased, and determining the disposition of the income of the trust created under said last will and testament as hereinafter more particularly set forth;

And It Appearing that in and by said Fifth clause of his his last will and testament, said Henry C. West, deceased, provided in part as follows:

> "Fifth: All the rest, residue and remainder of my estate, * * * I give, devise and bequeath to The Farmers' Loan and Trust Company * * * In Trust Nevertheless, for the following uses and purposes: * * * to apply the net income from said estate to the use of my wife, Emma M. West, during the term of her natural life, or until she shall remarry; Provided, However, that during the life of my said wife, Emma M. West, but not after her death, there shall be first ap-
> [fol. 16] plied out of the said net income the sum of One hundred dollars ($100.) per month to the use of my brother, Zimri West. If my said wife shall remarry, the aforesaid payment to my said brother shall continue to be made as long as my said wife lives."

And It Further Appearing that Zimri West, brother of the decedent, mentioned in the hereinabove quoted provision of the last will and testament of said Henry C. West, deceased, died on or about the 15th day of February, 1940, a resident of the City of Maplewood, County of Essex, State of New Jersey, and that no legal representative of said Zimri West has been appointed and that Zimri West was survived by his son, the respondent, Zimri West, 3rd, and his daughter, the respondent, Marie Elizabeth West Jones, who are his heirs-at-law and next-of-kin, and that no other child or children of deceased children nor widow survived said Zimri West.

And It Further Appearing that the respondent, Emma M. West, mentioned in the hereinabove quoted provision of the last will and testament of said Henry C. West, deceased, is still living and has not remarried; it is

Ordered, Adjudged and Decreed, Found and Determined as follows:

1. That said testator, Henry C. West, deceased, intended to and did provide in and by the Fifth clause of his last will and testament, and the true meaning and construction thereof is, that the monthly payment of $100 directed to be applied to the use of the testator's brother, Zimri West, [fol. 17] should be continued only during the life of his said brother, even though testator's wife, Emma M. West, should survive said brother;

2. That Emma M. West is now and has been since the 15th day of February, 1940, the date of the death of Zimri West, entitled to have the entire income from the trust, created under the Fifth clause of the last will and testament of Henry C. West, applied to her use during her life or until she shall remarry;

3. That the estate of Zimri West, deceased, is not and has not been entitled to any part of the income of said trust created under the Fifth clause of the last will and testament of Henry C. West, deceased, except such income as may have accrued to February 15, 1940, the date of the death of said Zimri West;

4. That neither Zimri West, 3rd and Marie Elizabeth West Jones who are now presumptively entitled to the income of the trust created under the Fifth clause of the last will and testament of Henry C. West, deceased, after the death or remarriage of Emma M. West, nor those who may hereafter be so presumptively entitled to the income of said trust from time to time hereafter, are entitled to have applied to their use any part of the income of said trust during the life of Emma M. West or until she shall remarry.

And the stipulation of all the parties who have appeared herein dated January 22, 1941, having been duly filed herein and the affidavit of James K. Taylor, Esq., duly sworn to on the 15th day of February, 1941, having been duly filed herein and the said Surrogate having rendered and filed his [fol. 18] decision in writing herein published in the New

York Law Journal on the 10th day of March, 1941, and said Gerald P. Culkin having duly made and filed his supplemental report herein duly verified the 27th day of March, 1941, wherein he reported said account to be in all respects correct and true except as to the objections theretofore made and filed by him, and a stipulation dated March 31, 1941, of all the parties who have appeared herein concerning the allocation to principal or income of numerous items of expenditures having been made and filed herein, and the affidavits of George F. Culhane and Thomas W. Harland, each duly sworn to on the 31st day of March, 1941, having been filed herein together with a stipulation of all the parties who have appeared herein, dated the 31st day of March, 1941, that if said persons were called as witnesses in this proceeding they would testify to the facts as stated in said respective affidavits and that said affidavits might be admitted in evidence in this proceeding, and the said Surrogate having rendered and filed his decision in writing herein published in the New York Law Journal on the 9th day of April, 1941, and in said second and third decisions of said Surrogate hereinabove mentioned said Surrogate having determined that said objections filed herein of said special guardian numbered I, II, III, IV, V and VII should be overruled and said objection numbered VI filed by said special guardian should be sustained in part; that certain items of expenditures set forth in said account should be charged to income instead of principal as capital improvements and that said account be adjusted as more particularly hereinafter set forth, and in all other respects said objection numbered VI of said special guardian should be [fol. 19] overruled and that said objections numbered 1 to 15, inclusive, filed on behalf of said Emma M. West should be overruled; it is

Ordered, Adjudged and Decreed:

5. That said objections filed herein by said special guardian numbered I, II, III, IV, V, and VII, and also numbered VI, excepting only as to the items herein mentioned in paragraphs 8 to 14, inclusive, hereof be and the same hereby are overruled.

6. That said objections numbered 1 to 15 filed herein on behalf of said Emma M. West be and the same hereby are overruled.

7. That said objection numbered VI filed by said special guardian be and the same hereby is sustained with respect to the items of said account hereinafter mentioned in paragraphs 8 to 14, inclusive, hereof.

8. That the following items of expenditures set forth in Schedule Cb of said account which were made by accountant during the second fiscal year of the operation of premises known as 46 Noll Street, Brooklyn, New York, to wit:

July 6, 1936 Repairing windows and furnishing and installing cellar door	$25.00
Dec. 12, 1936	5.00
Jan. 6, 1937 Repairs to heating and plumbing (part of $16.00)	8.00
Jan. 6, 1937 Electric fixtures and switches installed (part of $22.00)	11.00
Feb. 9, 1937	30.00

be and they hereby are charged to the income derived from [fol. 20] said premises and Schedule Cb of said account be and the same hereby is adjusted by increasing the item of carrying charges on said property appearing on page 15 thereof for said fiscal year from $385.34 to $464.34; by increasing the total of all carrying charges on said premises appearing on page 15 thereof from $3,085.11 to $3,164.11, by increasing the net deficit from the operation of said premises appearing on page 15 thereof for said fiscal year from $24.34 to $103.34; by increasing the total of all net deficits appearing on pages 15 and 16 thereof from $544.64 to $623.64; by decreasing the item of capital improvements appearing on page 15 thereof for said fiscal year from $246 to $167; and by decreasing the total of all capital improvements appearing on pages 15 and 16 thereof from $1,538.37 to $1,459.37.

9. That the following item of expenditure set forth in Schedule Cd of said account which was made by accountant during the first fiscal year of the operation of premises known as 2022 East 9th Street, Brooklyn, New York, to wit:

July 9, 1936	$8.00

be and it hereby is charged to the income derived from said premises and Schedule Cd of said account be and the same hereby is adjusted by increasing the item of carrying

charges appearing on page 16 thereof from $364.48 to $372.48; by increasing the total of all carrying charges on said premises appearing on page 16 thereof from $2,627.21 to $2,635.21; by increasing the net deficit from the operation of said premises appearing on page 15 thereof for said fiscal year from $364.48 to $372.48; by increasing the total [fol. 21] of all net deficits appearing on pages 16 and 17 thereof from $2,557.21 to $2,565.21; by decreasing the item of capital improvements appearing on page 15 thereof for said fiscal year from $80.38 to $72.38; and by decreasing the total of all capital improvements appearing on pages 16 and 17 thereof from $107.38 to $99.38.

10. That the following items of expenditures set forth in Schedule Cf of said account which were made by accountant during the first fiscal year of the operation of the premises known as 1441-3 66th Street, Brooklyn, New York, to wit:

Oct. 30, 1936	$14.00
Jan. 29, 1936	25.00
Feb. 19, 1936	13.75
Mar. 30, 1936	35.00

be and they hereby are charged to the income derived from said premiess and Schedule Cf of said account be and the same hereby is adjusted by increasing the item of carrying charges expended on said property appearing on page 15 thereof for said fiscal year from $463.61 to $551.36; by increasing the total of all carrying charges on said premises appearing on page 15 thereof from $2,825.28 to $2,913.03; by decreasing the net rents from the operation of said premises appearing on page 15 thereof for said fiscal year from $309.89 to $222.14; by decreasing the total of all net rents appearing on page 15 thereof from $1,234.57 to $1,146.82; by decreasing the amount of net rents in excess of 3% per annum for said fiscal year appearing on page 15 thereof from $174.89 to $87.14; by decreasing the total of the amount of net rents in excess of 3% appearing on pages [fol. 22] 15 and 16 thereof from $395.36 to $307.61; by decreasing the item of capital improvements appearing on page 15 thereof for said fiscal year from $555.22 to $467.47; and by decreasing the total of all capital improvements appearing on pages 15 and 16 thereof from $559.22 to $471.47.

11. That the following items of expenditures set forth in Schedule Cg of said account which were made by accountant during the first fiscal year of the operation of premises known as 2047 East 27th Street, Brooklyn, New York, to wit:

Sept. 1, 1936	Glass and sash chains in windows	$3.50
Dec. 2, 1936		2.00
Dec. 29, 1936		3.50

and the following items in said schedule, which expenditures were made by accountant during the second fiscal year of the operation of such property, to wit:

Jan. 22, 1937		$10.60
Mar. 27, 1937		19.00

be and they hereby are charged to the income derived from said premises and Schedule Cg of said account be and the same hereby is adjusted by increasing the items of carrying charges expended on said property appearing on page 12 thereof for said first and second fiscal years from $244.27 and $371.98 to $253.27 and $401.58, respectively; by increasing the total of all carrying charges on said premises appearing on page 12 thereof from $1,649.20 to $1,687.80; by decreasing the net rents derived from said premises appearing on page 12 thereof for said first and second fiscal years [fol. 23] from $250.73 and $95.52 to $241.73 and $65.92, respectively; by decreasing the total of all net rents derived from the operation of said premises appearing on page 12 thereof from $507.68 to $469.08; by decreasing the amount of rents in excess of 3% for said first fiscal year from $123.23 to $114.23; by decreasing the total of excess rents over 3% appearing on pages 12 and 13 thereof from $123.23 to $114.23; by decreasing the amount of net rents transferred to income for said second fiscal year, appearing on page 12 thereof, from $95.52 to $65.92; and by decreasing the total of all net rents transferred to income appearing on page 12 thereof, and also on page 13 of Schedule AII, from $340.19 to $310.59; by decreasing the items of capital improvements appearing on page 12 thereof for said first and second fiscal years from $344.56 and $198.38 to $335.56 and $168.78, respectively; and by decreasing the total of all capital improvements appearing on pages 12 and 13

thereof from $461.91 to $423.31; by decreasing the item of advances during the accounting period appearing on page 13 thereof from $177.08 to $147.48 and by decreasing the item of all amounts advanced to the date of the account from principal appearing on page 13 thereof and also on page 4 of Schedule H from $1,943.91 to $1,914.31.

12. That the following item of expenditure set forth in Schedule Ch of said account which was made by accountant during the first fiscal year of the operation of premises known as 240 Floyd Street, Brooklyn, New York, to wit:

Sept. 5, 1936 . . . . . $15.00

[fol. 24] be and it hereby is charged to the income derived from said premises and Schedule Ch of said account be and the same hereby is adjusted by increasing the amount of carrying charges expended on said property appearing on page 14 thereof for said fiscal year from $460.46 to $475.46; by increasing the total of all carrying charges on said premises appearing on page 14 thereof from $1,910.23 to $1,925.23; by decreasing the net rents from the operation of said premises appearing on page 14 thereof for said fiscal year from $31.54 to $16.54; by decreasing the total of all net rents appearing on page 14 thereof from $248.88 to $233.88; by decreasing the amount of net rents transferred to income appearing on page 14 thereof for said fiscal year from $31.54 to $16.54; by decreasing the total of all net rents transferred to income appearing on page 14 thereof and also on page 13 of Schedule A-2 from $149.43 to $134.43; by decreasing the item of capital improvements appearing on page 14 thereof for said fiscal year from $303.52 to $288.52; by decreasing the total of all capital improvements appearing on pages 14 and 15 thereof from $412.02 to $397.02; by decreasing the item of amounts advanced during the accounting period appearing on page 15 thereof from $413.09 to $398.09; and by decreasing the item of all amounts advanced to the date of the account appearing on page 15 thereof and also on page 4 of Schedule H from $1,262.88 to $1,247.88.

13. That the following item of expenditure set forth in Schedule Cj of said account which was made by accountant [fol. 25] during the first fiscal year of the operation of

premises known as 41 Montrose Avenue, Brooklyn, New York, to wit:

Mar. 9, 1937	—	$10.50

and the following items in said schedule, which expenditures were made by accountant during the second fiscal year of the operation of such property, to wit:

Feb. 10, 1938	Repairs to plumbing (part of $19)	$12.00
Feb. 10, 1938	General repairs to 2nd floor apt. to put in tenantable condition	15.99

be and they hereby are charged to the income derived from said premises and Schedule Cj of said account be and the same hereby is adjusted by increasing the items of carrying charges expended on said property appearing on page 13 thereof for said first and second fiscal years from $462.15 and $594.84 to $472.65 and $622.83, respectively; by increasing the total of all carrying charges on said premises appearing on page 13 thereof from $1,382.85 to $1,421.34; by increasing the net deficit from the operation of said premises appearing on page 13 thereof for said first fiscal year from $208.15 to $218.65; by decreasing the amount of net rents derived from said premises during said second fiscal year from $164.16 to $136.17; by decreasing the net rent throughout said operation appearing on pages 13 and 14 thereof from $113.35 to $74.86; by decreasing the items of capital improvements appearing on page 13 thereof for [fol. 26] the said first and second fiscal years from $1,008.59 and $347.24 to $998.09 and $319.25, respectively; by decreasing the total of all capital improvements appearing on pages 13 and 14 thereof from $1,355.83 to $1,317.34.

14. That Schedule AII of said account, at page 13 thereof, be and the same hereby is adjusted by decreasing the total amount of net rents from foreclosed properties transferred to income from $2,212.94 to $2,168.34; and by decreasing the amount of income shown to be received by said accountant, on page 13 of Schedule AII, from $28,966.49 to $28,921.89, and that Schedule H at page 4 be adjusted by decreasing the cash overdraft appearing thereon from $155.70 to $111.10 and by increasing the balance of principal on hand appearing thereon from $123,078.40 to $123,118.00; and that Schedule III of said account, at page 1 thereof, be adjusted by decreasing the amount of cash constituting in-

come remaining in the hands of accountant from $2,724.66 to $2,680.06 and the total amount of income shown to be on hand from $3,132.05 to $3.087.45.

15. That as so adjusted hereinabove, said account properly credits or charges to income or principal, as the case may be, all sums received of paid out by said accountant and properly apportions between income and principal the proceeds of sale and other sums received in connection with the ownership or sale of properties acquired by said accountant upon foreclosure of mortgages held as a part of the principal of said trust or by deed in lieu of such foreclosure.

[fol. 27] And the said matter having been duly adjourned to this day the said Surrogate after having duly examined said account now here finds the state and condition of said account to be as set forth in the following Summary Statement thereof made by the Surrogate as judicially adjusted, settled and allowed by him to be recorded with and taken to be a part of the decree in this matter, to wit:

A Summary Statement of the account of proceedings of City Bank Farmers Trust Company, as trustee under the last will and testament of Henry C. West, deceased, to and including the 31st day of July, 1940, made by the Surrogate as judicially adjusted, settled and allowed.

AS TO PRINCIPAL

Accountant is charged as follows:		
With amount of all property orginally received to constitute principal, as shown in Schedule "A"		$132,753 26
With amount of increases as shown in Schedule "A"		10 50
With amounts refunded to principal on account of advances (made by executor) for foreclosure expenses, etc., as follows:		
Premises 193 Bay 17th Street, Brooklyn, N. Y. as shown in Schedule "Ce", page 12	$29 16	
Premises 1441-3 66th Street, Brooklyn, N. Y., as shown in Schedule "Cf", page 16	311 72	340 88
Forward		$133,104 64
[fol. 28] Brought forward		$133,104 64

Accountant is credited as follows:

With amount of decreases, as shown in Schedule "B".		$5,186.12	
With amount of payments for administration expenses, chargeable against principal, as shown in Schedule "C"		766.76	
With amounts advanced (since May 13, 1936) from principal in connection with the following properties all situated in Brooklyn, N. Y., acquired by foreclosure or by deed in lieu of foreclosure as adjusted:			
Premises 46 Noll Street, as shown in Schedule "Cb", page 16	$751.68		
Premises 1855 East 7th Street, as shown in Schedule "Cc", page 12	420.98		
Premises 2022 East 9th Street, as shown in Schedule "Cd", page 17	2,315.53		
Premises 2047 East 27th Street, as shown in Schedule "Cg", page 13 as adjusted	147.48		
Premises 240 Floyd Street, as shown in Schedule "Ch", page 15 as adjusted	398.09	4,033.76	9,986.64
Leaving a balance of principal on hand of consisting of the property set forth in Schedule "H" carried at inventory value of $123,229.10, subject to a cash overdraft of $111.10.			$123,118.00

As to Income

Accountant is charged as follows:

With amount of all income received, as shown in Schedule "AII" as adjusted			$28,921.89
Forward			$28,921.89
[fol. 29] Brought forward			$28,921.89

Accountant is credited as follows:

With amount of all payments for necessary expenses, including commissions, chargeable against income, as shown in Schedule "CII"		$1,154.99	
With amount of all payments to or for the account of beneficiaries from income, as shown in Schedule "FI"		24,679.45	25,834.44
Leaving a balance of income on hand of consisting of $2,680.06 in cash and securities of $407.39, as set forth in Schedule "HI" as adjusted.			$3,087.45

And It Appearing that said accountant has fully accounted for all the moneys and property of said trust estate which have come or should have come into its hands as trustee as aforesaid during the period covered by said account, and said account having been duly adjusted by the said Surrogate and a Summary Statement of the same having been made as above and herewith recorded; it is

Ordered, Adjudged and Decreed:

16. That the said account be and the same hereby is judicially settled and allowed in all respects as filed and adjusted.

17. That said accountant has collected all of the assets of said trust estate which were collectible by it from the 31st day of July, 1940, and that in said account accountants have charged themselves with all moneys or property received by them and interest on all sums for which they should be charged and all sums with which said accountants have [fol. 30] credited themselves in said account were properly credited for moneys properly paid out by them for reasonable and necessary expenses, for losses incurred by them without fault on their part, or for moneys properly distributed by them and paid out by them to the beneficiaries of said trust estate.

18. That out of the balance of principal so found as above remaining in its hands the said accountant retain and pay unto itself the sum of One thousand three hundred fifty-six and 81/100 dollars ($1,356.81) as and for the commissions on principal to which it is entitled on this accounting for receiving the sum of One hundred thirty-two thousand seven hundred sixty-three and 76/100 dollars ($132,763.76) and for paying out the sum of Seven hundred sixty-six and 76/100 dollars ($766.76).

19. That out of the balance of income so found as above remaining in its hands said accountant retain and pay unto itself the sum of Three hundred sixty-two and 26/100 dollars ($362.26) as and for the commission on income to which it is entitled upon this accounting for receiving and paying out the sum of Thirty-nine thousand seven hundred seven and 50/100 dollars ($39,707.50).

20. That out of the balance of principal so found as above remaining in its hands said accountant retain and pay unto itself the sum of Forty-six and 70/100 dollars ($46.70) as and for its disbursements as taxed herein; and that it pay to Emma M. West, or to Messrs. Larkin, Rathbone & Perry, her attorneys, the sum of Five hundred and 00/100 dollars [fol. 31] ($500.00) as hereby allowed by the Surrogate for her counsel fees and other expenses necessarily incurred herein; and to Marie Elizabeth West Jones and Elizabeth Frances Jones, or their attorneys, Messrs. Butler, Wyckoff and Reid, the sum of Three hundred fifty and 00/100 dollars ($350.00) as hereby allowed by the Surrogate for their counsel fees and other expenses necessarily incurred herein; and to Gerald P. Culkin, Esq., the sum of One thousand

five hundred and 00/100 dollars ($1,500.00), which amount is hereby awarded to him for his services as special guardian in this proceeding.

21. That City Bank Farmers Trust Company, as trustee as aforesaid, after carrying out the provisions of this decree continue to hold and administer the balance of the property remaining in its hands constituting the principal of said trust as set forth above upon the trusts more particularly set forth in said will.

And It Appearing that the above mentioned balance of income remaining in the hands of said accountant after making the payment and deduction hereinbefore directed will consist of the sum of Two thousand three hundred seventeen and 80/100 dollars ($2,317.80) in cash and a Four hundred seven and 39/100 dollars ($407.39) interest in the bond and mortgage of Carmine Marrone covering premises known as 41 Montrose Avenue, Brooklyn, New York, in the principal amount of Three thousand two hundred dollars ($3,200), upon which, on July 31, 1940, there was due the sum of Three thousand and fifty dollars ($3,050.00), which said interest is subordinate in lien to a prior interest originally of One thousand twenty-three and 51/100 dollars ($1,023.51) due to principal upon which [fol. 32] there remained unpaid on July 31, 1940, the sum of Eight hundred seventy-three and 51/100 dollars ($873.51); it is

Ordered, Adjudged and Decreed:

22. That City Bank Farmers Trust Company pay and transfer to said Emma M. West said balance of income remaining in its hands after making the aforesaid payment and deduction hereinbefore directed so far as the same consists of cash, to wit, the sum of Two thousand three hundred seventeen and 80/100 dollars ($2,317.80).

23. That upon complying with the provisions of this decree said City Bank Farmers Trust Company in its individual capacity and as trustee of the trust created under the last will and testament of said Henry C. West, deceased, be and it hereby is discharged from any and all responsibility, liability or accountability with respect to or by reason of any matter or thing set forth in the account herein or in this decree except that said City Bank Farmers Trust Company shall remain accountable for the balance of principal

and said subordinate interest in said bond and mortgage remaining in its hands after carrying out the provisions of this decree.

And It Further Appearing that said trust estate consisted of bonds and mortgages acquired by testator and that certain of these mortgages were foreclosed by accountant as executor or as trustee and the property covered by said mortgages was purchased by accountant upon the foreclosure sale and that in certain instances a deed in lieu of such foreclosure was taken by accountant as such executor or [fol. 33] trustee; that, in all, nine separate parcels of real property so acquired have been held by said trustee and that said trustee expended sums of money in the acquisition of said parcels and further sums of money during the respective periods of ownership thereof and that rents were received from said premises by said trustee; that two of said parcels were sold prior to April 13, 1940, and that seven of such parcels remained in the hands of the trustee at the date of the account rendered and filed herein; that the trust estate remaining in the hands of accountant at the date of such account consists in part of mortgages so acquired by testator; that Bond and Mortgage Guarantee Company had guaranteed the payment of principal and interest of the obligations secured by certain of such bonds and mortgages and that while the interest upon such obligations was collected by said company, it deducted therefrom as a charge for the guarantee in each year one-half of one per centum of the principal amount secured; that said Bond and Mortgage Guarantee Company is now in liquidation and that the agency of said company as to each of the bonds and mortgages under which the respective properties were acquired by accountant was terminated by accountant prior to such acquisition; that after such termination of the agency of Bond and Mortgage Guarantee Company said accountant agreed with the owner of premises known as 240 Floyd Street, Brooklyn, New York, that the interest rate on the obligations secured by the mortgage then held by said accountant covering said premises should be reduced to four per centum per annum and that thereafter said mortgage was foreclosed and accountant purchased said property at the foreclosure sale and continued to hold said [fol. 34] property at the date of its account herein; that in

the proceeding for the liquidation of Bond and Mortgage Guarantee Company said accountant filed claims with respect to each of the bonds and mortgages under which properties were so acquired covering the period to December 31, 1937, the date as of which the rights of the parties in such liquidation proceeding were fixed, and said claims have been allowed in said liquidation proceeding and dividends upon such claims will be received by accountant hereafter; that no decree or judgment of any court or agreement or action by any of the parties has determined the method of computation of net rents or of apportionment and allocation thereof or of the proceeds of sale of such property or of the amounts which may be received upon such guaranties between income and principal of said trust estate whether such property had been so acquired prior to the date of such account or have been or may hereafter be so acquired by accountant subsequent to such date or whether such rents were received before the date of said account or have been or may hereafter be received subsequent thereto; that the will of Henry C. West under which said trust was created directs the trustee to apply the net income from the trust estate to the use of the persons therein named; that said will contains no express provision directing the manner of computation of net rents from properties so acquired by said trustee upon foreclosure of mortgages or by deed in lieu thereof or the apportionment and allocation of such rents or of the proceeds of sale of such properties of the amounts which may be received upon such guaranties; and, that the said trustee in its petition herein has prayed that this court construe the last will and testament of said Henry [fol. 35] C. West, deceased, with respect to such matters and for instructions by this court with respect thereto, as is more fully set forth in said petition; it is

Ordered, Adjudged and Decreed:

24. (a) The accountant, as trustee under the last will and testament of Henry C. West, deceased, has acquired upon the foreclosure, or by deed in lieu of foreclosure, of mortgages held by it on or prior to April 13, 1940, and now holds, the following parcels of real property:

46 Noll Street, Brooklyn, New York.
1855 East 7th Street, Brooklyn, New York.
2022 East 9th Street, Brooklyn, New York.
193 Bay 17th Street, Brooklyn, New York.

1441-3 66th Street, Brooklyn, New York.
2047 East 27th Street, Brooklyn, New York.
240 Floyd Street, Brooklyn, New York.

(b) Each of such parcels and each parcel of real property hereafter acquired by the trustee, either upon foreclosure or by deed in lieu of foreclosure of a mortgage so held by it on April 13, 1940, covering the same, shall be held by the trustee upon a separate trust to sell the same. For the purpose of apportioning the rents and income and proceeds of sale received from said parcels, the trustee shall maintain a separate account with respect to each such parcel, reflecting separately the principal and income charges and credits as hereinafter provided. Said accounts shall be kept on a cash rather than an accrual basis, *i. e.*, receipts shall be credited when received and payments shall be charged when made, irrespective of the time when such receipts and expenses may have accrued.

[fol. 36] (c) For the purposes of this Article 23 of this decree, and with respect to each such parcel of real property, (1) the term "principal of the mortgage" shall be deemed the principal amount of the mortgage covering each such parcel of real property, which remained due and was secured to be paid by said mortgage immediately prior to the foreclosure thereof or the acquisition of such property by deed in lieu of foreclosure, and (2) the term "mortgage rate" shall be deemed to be the full rate of interest payable on the principal of the mortgage covering such parcel of real property immediately prior to the foreclosure of said mortgage or the acquisition of such property by deed in lieu of foreclosure; that is to say: if the rate of interest provided in the mortgage was reduced by the trustee prior to the foreclosure or acquisition by deed in lieu of foreclosure, the mortgage rate shall be the rate to which the same was reduced by the trustee; if the mortgage was guaranteed, no allowance shall be made for the sum deducted from the interest payable on the principal of said mortgage by the guarantor, but the full rate provided to be paid by the mortgagor shall be deemed the mortgage rate. Accordingly, the mortgage rate with respect to each of the following parcels shall be the rate set opposite the same below, to wit:

46 Noll Street, Brooklyn, New York	6%
1855 East 7th Street, Brooklyn, New York	6%

2022 East 9th Street, Brooklyn, New York	6%
193 Bay 17th Street, Brooklyn, New York	6%
1441-3 66th Street, Brooklyn, New York	6%
2047 East 27th Street, Brooklyn, New York	6%
240 Floyd Street, Brooklyn, New York	4%

(d) The income account with respect to each said parcel shall be kept on an annual fiscal year basis. The first day [fol. 37] of each such fiscal year shall be the date of acquisition of such property or the anniversary thereof.

(e) The rents and other income, if any, collected during each such fiscal year from said parcel shall be credited to the income account with respect thereto, and all ordinary expenses incurred in the operation of such property and paid during such year shall be charged against said income account.

(f) All other expenses incurred in the acquisition or the operation of such property shall be charged against the principal account with respect to said parcel; included among the sums so chargeable against principal which shall not be deemed ordinary operating expenses are the following: All expenses incurred in connection with the foreclosure or in securing a conveyance in lieu of foreclosure; all taxes upon such parcel and other liens which accrued prior to the date of acquisition of such property by the trustee; and the cost of all capital improvements; if because of the use or neglect of such property prior to the acquisition thereof it is not in a rentable condition when acquired, the cost of rehabilitation, that is, the expenses necessary to put the property in a state of repair reasonably commensurate with its type and location in order to be rentable for its reasonable value, are chargeable to principal as part of the cost of capital improvements.

(g) At the close of each fiscal year the net income from the operation of each such parcel during such year as determined by such income account shall be computed.

[fol. 38] (h) The net amount of the income from each such parcel in each such fiscal year up to but not exceeding three per centum of the principal of the mortgage shall be deemed to be income of the trust and shall be credited to the income account of the general trust estate. Any bal-

ance of such income shall be credited to the principal account with respect to such property and shall be used to repay advances from principal hereinafter authorized to be made and if such advances be entirely repaid, such income shall be impounded (subject to reinvestment as any other principal pursuant to the terms of the will) to await the sale of said premises and apportionment with such proceeds of sale. Said sums of income are hereinafter referred to as "net rents credited to income" or "principal," respectively. Any income derived from any sum so impounded shall be deemed to be and shall be distributed as income of the general trust estate.

(i) Upon the sale of each such parcel by the trustee, the balance of income, if any, standing to the credit of the income account with respect to such property representing the net income from such property during the fiscal year in which the same is sold, shall be distributed between principal and income by crediting to income so much thereof as may be equal to but shall not exceed interest on the principal of the mortgage at the rate of three per cent. per annum for the period commencing at the first of said fiscal year and ending on the date the sale of said premises is closed, and by crediting the principal the balance, if any, of said net income. The sums so credited to principal and income shall be held and disposed of in the same manner as the sums [fol. 39] credited to principal and income pursuant to paragraph (h) hereof.

(j) If at the end of any fiscal year, or upon such sale, it is determined from such income account with respect to any such parcel, that it has been operated at a deficit during such fiscal year, or part thereof, such deficit shall be charged to the principal account with respect to such parcel.

(k) Any income from any of such parcels of real property credited to the income account of the general trust estate as provided in paragraphs (h) and (i) hereof, shall be treated as any other income of the trust estate and shall be distributable by the trustee as such to the person or persons entitled to receive such income, and such trustee shall not be subject to surcharge by reason of distributing any such income, even if upon the sale of such property it shall appear that the income beneficiary or beneficiaries shall have received more than such beneficiary or beneficiaries

would otherwise be entitled to receive as income from such property, nor shall the trustee or any other person interested in the trust fund be entitled to recoup any part of the income from any of said parcels of real property distributed to the income beneficiary or beneficiaries as herein provided.

(l) Pending the sale of each such parcel of real property by the trustee, any sums chargeable against the principal account with respect thereto may be advanced by the trustee out of the principal of the general trust estate. If at any time the expenses of operation of any such parcel exceed the balance credited to the income account with respect [fol. 40] thereto, the amount required to pay such expenses may be advanced from the principal of the general trust estate.

(m) Any amounts of income from any such parcel credited to the principal account with respect thereto, pursuant to paragraphs (h) and (i) hereof shall be applied first in discharge of the sums charged to the principal account with respect to such parcel. The principal of the trust estate shall have a first lien against the proceeds of sale of each such parcel for any sum of principal advanced as provided in this article in connection with such parcel, and not repaid from the income collected from such parcel, hereinafter in this article referred to respectively as "principal advances," and "the balance of principal advances."

(n) Upon the sale of each such parcel by the trustee, the proceeds thereof after first deducting the expenses of such sale plus the balance of net rents credited to principal in excess of principal advances, if any, shall be distributed between principal and income as follows:

(i) There shall first be deducted therefrom and transferred to principal the balance of principal advances, if any. The balance remaining is hereinafter referred to as the "balance for distribution."

(ii) For purposes of apportionment there shall be added to the balance then remaining all net rents credited to income.

(iii) The resulting sum shall be apportioned between principal and income in the proportions which the principal amount set forth in subdivision (a) below and the

[fol. 41] income amount set forth in subdivision (b) below bear to each other:

(a) the principal amount shall be the principal of the mortgage, and, if interest from a date prior to the death of the decedent was unpaid, there shall be added thereto interest at the mortgage rate on the principal of the mortgage from the last day to which interest was paid thereupon to the date of the death of the decedent; and

(b) the income amount shall be interest at the mortgage rate on the principal of the mortgage from the date of death of the decedent or from the last date to which interest was paid on said mortgage, whichever date shall be later, to the date of sale of the respective premises by the trustee.

(iv) From the amount so apportioned to income there shall be deducted the net rents credited to income of the general trust estate and the balance so apportioned to income shall be credited to income of the general trust estate out of the balance for distribution and is hereinafter referred to as "the income share of the balance for distribution"; if the net rents credited to income shall be equal to or exceed the amount so apportioned to income, income shall receive no further sum; the remainder of the balance for distribution (or all thereof, as the case may be) shall be credited to principal of the general trust estate and is hereinafter referred to as "the principal share of the balance [fol. 42] for distribution."

(o) If part of the proceeds of sale of any such parcel of real property shall consist of a purchase money mortgage, then any cash and such purchase money mortgage representing net proceeds of such sale and net rents credited to income in excess of principal advances, if any, shall be distributed as follows:

(i) The cash, if sufficient, shall be utilized to repay the balance of principal advances.

(ii) After such repayment of principal advances, if the balance for distribution consists of cash and a purchase money mortgage, such cash and such purchase money mortgage shall each be apportioned be-

tween and credited to principal and income in the proportions which the principal share of the balance for distribution and the income share of the balance for distribution shall bear to each other.

(iii) If such cash is not sufficient to discharge in full the balance of principal advances as set forth in subdivision (i) of this paragraph (o), then the principal of the trust estate shall have a first lien upon such purchase money mortgage for the balance of such principal advances, and any sums paid on account of the principal of said purchase money mortgage shall first be used to pay and discharge said lien. Any further payments on account of said purchase money mortgage shall be apportioned between principal and income in [fol. 43] proportion to their respective interests therein.

(iv) Any interest received on any such purchase money mortgage shall be deemed to be income earned by the trust estate and distributable as such.

25. That any sums which may be received upon the claims which have been allowed to the trustee in the proceeding for the liquidation of Bond and Mortgage Guarantee Company on account of the guaranty of mortgages with respect to which real property was heretofore acquired shall be apportioned between principal and income as follows:

(a) It shall be presumed that that amount of the respective allowances made in said proceeding which is equal to the amount of unpaid interest secured by the respective guaranties, or all thereof if the allowance be less than such unpaid interest, is allowance on account of loss of interest and the balance, if any, is allowance on account of loss of principal; of such allowance on account of loss of interest only that part representing loss of interest since the date of death of the decedent shall be considered allowance for loss of income for purposes of apportionment by the trustee.

(b) The allowances made in said proceeding for claims with respect to the guaranty of the obligations secured by the mortgages covering the below described premises shall be deemed to be allowance on account

of loss of income and allowance on account of loss of principal in the amounts set forth below, to wit:

[fol. 44]

	Principal allowance	Income allowance
46 Noll Street, Brooklyn, N. Y.	$2,873.92	$ 806.67
1855 East 7th Street Brooklyn, N. Y.	$1,882.36	$1,411.67
2022 East 9th Street, Brooklyn, N. Y.	$4,209.41	$1,383.75
193 Bay 17th Street, Brooklyn, N. Y.	$ 110.85	$1,008.33
1441-3 66th Street, Brooklyn, N. Y.	0.00	$ 532.59
2047 East 27th Street, Brooklyn, N. Y.	$2,436.17	$ 857.08
240 Floyd Street, Brooklyn, N. Y.	$1,088.42	$ 465.00

(c) If any sums shall be paid to said trustee upon such claims prior to the sale of the respective premises, such payment shall be apportioned between principal and income in the proportion which the allowance on account of loss of principal bears to the allowance on account of loss of income; the amount so apportioned to income shall be credited on the date received by the trustee to the respective separate income accounts hereby directed to be maintained by accountant in Article 23 hereof and shall be treated in the same manner as ordinary income from the respective properties. The amount apportioned to principal shall be credited to such respective separate principal accounts and shall be treated in the same manner as a payment to such account of income in excess of three per centum of the principal amount secured by the mortgage as hereinbefore directed in Article 23 hereof.

[fols. 45-47] (d) If any sums shall be paid to said trustee upon such claims after the sale of the respective premises, such payment shall be apportioned between principal and income in the proportions specified in subdivision (iii) of paragraph (n) of Article 23 hereof for the apportionment of the proceeds of sale of

and net income from the respective properties and shall be credited accordingly to the principal and income accounts of the general trust estate.

26. That the salvage operations with respect to premises known as 168 Morrison Avenue, West New Brighton, Staten Island, New York, and 41 Montrose Avenue, Brooklyn, New York, were completed by the sale of the premises on August 25, 1939 and August 9, 1939, respectively, and since such operations were completed prior to April 13, 1940, the date on which Chapter 452 of the Laws of 1940 (Section 17-c of the Personal Property Law) became a law the allocation and apportionment of the rents derived therefrom and the proceeds of sale thereof were not affected in any way by the enactment of said law.

James A. Foley, Surrogate.

[fol. 48] In Surrogate's Court, County of New York

Petition for Judicial Settlement of Trustee's Account; for Construction of Will; and for Instructions and Directions

To the Surrogate's Court of the County of New York:

The petition of City Bank Farmers Trust Company as trustee under the last will and testament of Henry C. West, deceased, respectfully shows to this Court, upon information and belief:

1. Your petitioner is a domestic corporation having its principal office and place of business at No. 22 William Street, in the Borough of Manhattan, City, County and State of New York, and prior to June 28, 1929, was known as The Farmers' Loan and Trust Company.

2. Henry C. West died on the 1st day of May, 1934, a resident of the City, County and State of New York. Said decedent left a last will and testament bearing date the 14th day of December, 1928, which was duly admitted to probate by the Surrogate's Court of the County of New York, to which jurisdiction in that behalf belonged, on the 28th day of May, 1934. A copy of said last will and testament is

annexed to the account of proceedings of your petitioner, herewith filed.

3. Said testator in and by the "Fifth" and "Eighth" clauses of his will provided as follows:

[fol. 49] "Fifth: All the rest, residue and remainder of my estate, both real and personal, wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my death, I give, devise and bequeath to The Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the State of New York, in Trust, Nevertheless, for the following uses and purposes: To lease said real property and collect the rents thereof, and to invest and from time to time in its discretion reinvest the personal property in such securities as to it may seem proper; to collect the rents, issues and profits of all of my said residuary estate, and, after paying all necessary charges of administration, to apply the net income from said estate to the use of my wife, Emma M. West, during the term of her natural life, or until she shall remarry.; Provided, However, that during the life of my said wife, Emma M. West, but not after her death, there shall be first applied out of the said net income the sum of One hundred dollars ($100.) per month to the use of my brother, Zimri West. If my said wife shall remarry, the aforesaid payment to my said brother shall continue to be made as long as my said wife lives.

Upon the death or remarriage of my said wife, my Trustee shall set aside from my residuary estate cash or securities having a then value of Thirty thousand dollars ($30,000.) and shall continue to hold and administer the same, In Trust, and shall pay or apply [fol. 50] the net income therefrom to the use of my nephew, Zimri West, 3rd, during the term of his life, and upon his death shall transfer and pay over the principal of such trust fund to my grandniece, Elizabeth Frances Jones, if she is then living, or, if she shall then be dead, shall transfer and pay over the same in equal shares per stirpes to and among her issue then living. The balance of my said residuary estate my Trustee shall continue to hold and administer, In Trust, to pay or apply the net income therefrom to or for the

use of my niece, Marie Elizabeth West Jones, during the term of her life and upon her death shall transfer and pay over one-third of the principal of such trust fund to her daughter, my grandniece, Elizabeth Frances Jones, or if she shall then be dead, to her issue then living in equal shares per stirpes, and shall transfer and pay over the remaining two-thirds of such trust fund in equal shares per stirpes to the issue then living of my wife's niece, Wealthy Albro Lewis Demorest. If, pursuant to the foregoing provisions of this my will, any part of my estate shall have been held in trust for a period of two lives and shall not therefore by law be eligible to be continued in trust for an additional period as directed by this Will, such part of my residuary estate shall, at the expiration of a period of two lives during which it has been held in trust, be transferred and paid over by my Trustee outright, free and discharged of any trust, to the persons otherwise entitled pursuant to the provisions of this Will to receive the [fol. 51] income therefrom. If at any time pursuant to the provisions of this my Will, any part of my property shall not have been effectually devised or bequeathed, I hereby give, devise and bequeath the same at such time to the then living issue of my wife's niece, Wealthy Albro Lewis Demorest.

. . . . . .

"Eighth. I nominate, constitute and appoint The Farmer's Loan and Trust Company, a corporation organized and existing under the laws of the State of New York, having its principal place of business at Number Twenty-two William Street, in the Borough of Manhattan, City, County and State of New York, to be the Executor of and Trustee under this my last will and testament, and I direct that no bond or other security shall be required of it for the faithful performance of its duties in either capacity."

4. Letters testamentary on said last will and testament, bearing date the 29th day of May, 1934, were duly issued out of said Court to your petitioner, the executor and trustee therein named. Your petitioner duly qualified as executor of and as trustee under said last will and testament.

5. On or about the 17th day of June, 1935, your petitioner duly filed in the Surrogate's Court of the County of New York, to which jurisdiction in that behalf belonged, an account of its proceeding to the 15th day of May, 1935, as executor as aforesaid, together with a petition praying that [fol. 52] said account be judicially settled and allowed, and on or about the 29th day of June, 1936, your petitioner duly filed in said court a supplemental account of its proceedings to the 13th day of May, 1936, as such executor, together with a supplemental petition praying that said supplemental account be judicially settled and allowed, and such proceedings were thereafter had that on or about the 13th day of August, 1936, a decree of the Surrogate's Court of the County of New York, bearing date the 10th day of August, 1936, was duly made and entered judicially settling and allowing said account and said supplemental account, and directing your petitioner, as such executor, to pay to itself, as such trustee, the balance of principal and income remaining in its hands after making certain payments directed to be made in such decree.

6. Your petitioner, as trustee as aforesaid, duly received the property constituting said trust and has been, and now is, acting as trustee of the trust created under said last will and testament of Henry C. West, deceased.

7. The account of proceedings of your petitioner as trustee under the last will and testament of Henry C. West, deceased, has never been judicially settled and allowed. Accordingly, your petitioner has filed herewith an account of its proceedings to and including the 31st day of July, 1940, to the end that the same may be judicially settled and allowed.

8. Emma M. West, the life beneficiary of the trust created under said last will and testament, is still living and [fol. 53] has not remarried. Zimri West, brother of the decedent, to whose use the sum of One hundred dollars ($100) per month out of the income of said trust was directed to be applied, died on the 15th day of February, 1940, a resident of the City of Maplewood, County of Essex, State of New Jersey. No legal representative of said Zimri West has been appointed. Said Zimri West was survived by his son, Zimri West, 3rd, and his daughter, Marie Elizabeth West Jones, who are his heirs at-law and next of kin, there

being no other children or children of deceased children nor widow surviving said Zimri West. Your petitioner is informed that said Zimri West left a last will and testament, which has not been admitted to probate, which named said Zimri West, 3rd, executor thereof and sole legatee thereunder.

9. In and by the "Fifth" clause of his will, said testator provided, in part, as follows:

> "Fifth. All the rest, residue and remainder of my estate, * * * I give, devise and bequeath to The Farmers' Loan and Trust Company * * * In Trust, Nevertheless, for the following uses and purposes: * * * to apply the net income from said estate to the use of my wife, Emma M. West, during the term of her natural life, or until she shall remarry; Provided, However, that during the life of my said wife, Emma M. West, but not after her death, there shall be first applied out of the said net income the sum of One hun- [fol. 54] dred dollars ($100) per month to the use of my brother, Zimri West. If my said wife shall remarry, the aforesaid payment to my said brother shall continue to be made as long as my said wife lives."

Your petitioner is advised by counsel that in their opinion, under the true meaning and construction of said last will and testament, upon the death of the said Zimri West the entire income of said trust should be applied to the use of the said Emma M. West, but that since there may be some doubt with respect thereto, your petitioner should secure the approval of this Court of such construction by application for a judicial determination of the construction and effect of the above quoted portion of the "Fifth" clause of said last will and testament. Your petitioner, therefore, desires that this Court judicially determine the construction and effect of said portion of said last will and testament as to whether the entire income of said trust shall be paid to said Emma M. West during her life or until she shall remarry after the death of said Zimri West.

10. As is shown in Schedule "F" of the supplemental account of your petitioner as executor of the last will and testament of said deceased and in Schedule "A" of the account of your petitioner as trustee, filed herewith, your

petitioner, as trustee, received, as a part of the property constituting said trust, seven certain parcels of real property which had been acquired by your petitioner as such executor upon foreclosure, or by deed in lieu of foreclosure, of mortgages constituting part of the estate of said dece-
[fol. 55] dent. Said parcels of real property are known by and as the street numbers:

46 Noll Street, Brooklyn, New York,
190 Bay 17th Street, Brooklyn, New York,
240 Floyd Street, Brooklyn, New York,
1441-3 66th Street, Brooklyn, New York,
1855 East 7th Street, Brooklyn, New York,
2022 East 9th Street, Brooklyn, New York,
and
2047 East 27th Street, Brooklyn, New York.

As is further shown by Schedule "CII" of said account and Schedule "Ca" of said supplemental account of your petitioner, as executor as aforesaid, it was necessary that your petitioner expend certain sums for arrears of taxes, water rents and expenses of foreclosure, or of deed in lieu of foreclosure, and other costs of acquisition, and during the period of ownership it was necessary that your petitioner expend additional sums in payment of taxes, water rents, insurance premiums, improvements, repairs, and other items incurred in the operation of said properties, and on certain of said properties income was received by way of rents. As is shown in said account and supplemental account of your petitioner, as executor as aforesaid, the sums so expended, above the rents received, were temporarily advanced from principal of the estate.

11. With respect to the properties so acquired and to the receipts and disbursements made in connection therewith, the aforesaid decree judicially settling and allowing said account and supplemental account of your petitioner, as executor as aforesaid, dated the 10th day of August, 1936, provided as follows:

[fol. 56] "Further Ordered, Adjudged and Decreed that each of the properties received as a result of foreclosure and transferred by said executor to itself as trustee under said decedent's will, be held in a separate account by the trustee, so that all expenses and dis-

bursements incurred in connection with the acquisition of each property as shown in the account and supplemental account herein, together with any and all future receipts and disbursements in connection with each property, may be taken into consideration by the trustee in apportioning the proceeds received upon the ultimate sale of the respective properties between principal and income and that the rights of all persons interested in said trust be and the same hereby are reserved to assert upon any future accounting that any such receipts and disbursements should be taken into consideration by the court in determining the proper apportionment of the proceeds of sale of said properties; and it is

"Further Ordered, Adjudged and Decreed that the amounts herein directed to be paid to said trustee, together with all property heretofore distributed by said executor to itself as trustee, be and the same hereby are made subject to such further taxes and such further expenses in connection with mortgage foreclosures or otherwise as may be payable;"

12. Your petitioner, as trustee as aforesaid, has acquired two certain additional parcels of real property upon foreclosure and by deed in lieu of foreclosure of mortgages con- [fol. 57] stituting a part of the principal of the trust created under the last will and testament of said decedent, and in connection therewith has necessarily expended certain sums for arrears of taxes, water rents and expenses of foreclosure, or of deed in lieu of foreclosure, and other costs of acquisition. Said parcels are known as and by the street numbers:

168 Morrison Avenue, West New Brighton, Staten Island, New York; and
41 Montrose Avenue, Brooklyn, New York.

In connection with the parcels of real property so acquired by your petitioner, as trustee as aforesaid, and in connection with those parcels of real property received by your petitioner, as trustee, from itself, as executor as aforesaid, as is shown in Schedules "Ca" to "Cj" of the account of your petitioner, as trustee as aforesaid, filed herewith, it was necessary that your petitioner expend additional sums in payment of taxes, water rents, insurance

premiums, improvements, repairs, and other items incurred in the operation of said properties, and on certain of said properties income was received by way of rents. As is shown in said account of your petitioner, as trustee as aforesaid, the sums so expended above the rents received were advanced from principal of said trust.

13. Your petitioner has sold and conveyed two of the aforesaid parcels of real property, to wit, premises 168 Morrison Avenue, West New Brighton, Staten Island, New [fol. 58] York, on August 25, 1939, and 41 Montrose Avenue, Brooklyn, New York, on August 9, 1939. As is shown in Schedules "Ci" and "Cj" of the account of your petitioner filed herewith, your petitioner has received the proceeds of sale of said properties which consist, in respect to 168 Morrison Avenue, entirely of cash, and in respect to 41 Montrose Avenue, cash and a purchase money mortgage.

14. Each of the mortgages which covered the parcels of real property so acquired by your petitioner was guaranteed by Bond and Mortgage Guarantee Company, which said company is now in liquidation. As is shown in Schedules "Ca" to "Cj", inclusive, of the account of your petitioner filed herewith, your petitioner has presented in the proceeding for the liquidation of said Bond and Mortgage Guarantee Company claims arising out of the guaranty by said company of each of said mortgages and said claims have been allowed in varying sums. Your petitioner is informed that said claims as allowed will not be paid in full, but that from time to time dividends thereupon will be paid.

15. Your petitioner is advised by counsel that under the true meaning and construction of the will of said decedent, a part of the sums of money or other property received by it as executor or as trustee, or which may hereafter be received by it as trustee as rents from said properties or as proceeds of sale thereof, or upon claims arising out of the guaranty of said mortgages, may constitute income of said trust estate which should be paid to those persons who are now or may hereafter be entitled to the income from said [fol. 59] trust estate, but that there is doubt concerning what proportion, if any, of said rents, proceeds of sale or payments made on account of said claims, may be deemed to be income of the trust created by the will of said testator,

and which now or hereafter should be paid to the persons entitled to the income therefrom, and said counsel further advised your petitioner that it may not safely distribute any part of the sums so received until and unless this Court construes said last will and testament, and determines what proportion, if any, of said rents, proceeds of sale, or moneys received on account of said claims should be distributed as part of the income of the trust estate.

For the convenience of the court your petitioner has included in each of said Schedules "Cb" to "Cj", inclusive, of the account of your petitioner filed herein, a statement of all transactions in connection with each of said premises, and of the facts in connection therewith, and a tentative apportionment between income and principal of the moneys received from said premises by way of rents or proceeds of sale thereof.

16. The names of all persons who are or may be entitled, absolutely or contingently, by the will of Henry C. West, deceased, or by operation of law, to share in the proceeds of the property held by your petitioner as trustee of the trusts created under said last will and testament, together with their places of residence and post office addresses are, as follows:

Emma M. West, widow of the decedent and life bene-
[fol. 60] ficiary of the trust, who resides at and whose post office address is 1140 Fifth Avenue, New York, New York.

Zimri West, 3rd, nephew of the decedent and survivor life beneficiary of $30,000 of the principal of the trust fund, a son of Zimri West, deceased, and one of his heirs at law and next of kin, who is named executor of and sole legatee under the unprobated will of Zimri West, deceased, who resides at and whose post office address is 118 North Grove Street, East Orange, New Jersey.

Marie Elizabeth West Jones, niece of the decedent and survivor life beneficiary of the balance of the principal of the trust fund, a daughter of Zimri West, deceased, and one of his heirs at law and next of kin, who resides at and whose post office address is 718 Springfield Avenue, Summit, New Jersey.

Elizabeth Frances Jones, a contingent remainderman of the trust, who resides at and whose post office address is 718 Springfield Avenue, Summit, New Jersey.

Dilys Demorest, a contingent remainderman of the trust, who resides at and whose post office address is Upper Dogwood Lane, Rye, New York.

William J. Demorest, Jr., a contingent remainderman of the trust, who resides at and whose post office address is Upper Dogwood Lane, Rye, New York.

Ann Demorest, a contingent remainderman of the trust, who resides at and whose post office address is [fol. 61] Upper Dogwood Lane, Rye, New York.

Carolyn Demorest, a contingent remainderman of trust, who resides at and whose post office address is Upper Dogwood Lane, Rye, New York.

There are no persons, other than those above named, interested in this proceeding.

All of the above persons are of full age and sound mind to the best of petitioner's knowledge, information and belief, except that William J. Demorest, Jr., and Ann Demorest are infants over the age of fourteen years, and Carolyn Demorest is an infant under the age of fourteen years. All of said infants reside with their mother, Wealthy Albro Lewis Demorest, who resides at and whose post office address is Upper Dogwood Lane, Rye, New York.

None of said infants has any general or testamentary guardian.

Wherefore, your petitioner prays:

I. That the account of its proceedings, as trustee under the last will and testament of Henry C. West, deceased, to and including the 31st day of July, 1940, be judicially settled and allowed.

II. That this Court determine the construction and effect of the "Fifth" clause of the Last Will and Testament of said Henry C. West, deceased, as to whether after the death of Zimri West, Emma M. West is entitled to the entire income from the trust created pursuant to said clause of said [fol. 62] last will and testament during her life or until she shall remarry.

III. That this Court construe the last will and testament of the said Henry C. West, deceased, for the purpose of determining what proportion, if any, of the moneys or property received or which may be received by way of rents or *proceeds of sale of real property*, acquired upon foreclosure or by deed in lieu of foreclosure of mortgages, or on account of claims based upon the guaranty of such mortgages, should be apportioned either to the income or principal of the trust estate created by said will and what part, if any, may or should be paid or applied to the use of those persons who now or hereafter may be entitled to receive or have applied to their use the income of said trust estate; and that your petitioner be instructed with respect to the proper method, under the true construction of said will, which should be employed in computing the net rents received from said or similar properties and the proper method of apportioning between principal and income such net rents, proceeds of sale of said properties or similar properties which may be hereafter acquired by your petitioner as such trustee, and of any moneys received or which may be received on account of any claims based upon such guaranties.

IV. That the persons above named may be cited to show cause why said account should not be judicially settled and allowed, why said last will and testament should not be judicially construed as prayed for in the petition herein, and why your petitioner should not be instructed and [fol. 63] directed by this Court as prayed for in the petition herein.

Dated: New York, N. Y., November 18, 1940.

City Bank Farmers Trust Company, by S. R. Walker, Trust Officer.

Attest: Crosby T. Smith, Asst. Secretary.

Mitchell, Taylor, Capron & Marsh, Attorneys for Petitioner, Office and Post Office Address: 20 Exchange Place, New York, N. Y.

(Verified by S. R. Walker, November 18, 1940.)

[fol. 64] IN SURROGATE'S COURT,
County of New York.

EXCERPTS FROM INTERMEDIATE ACCOUNT OF TRUSTEE'S PROCEEDINGS AS ADJUSTED PURSUANT TO THE DECREE OF THE SURROGATE'S COURT

To the Surrogate's Court of the County of New York:

City Bank Farmers Trust Company hereby renders the following intermediate account of its proceedings as trustee under the last will and testament of Henry C. West, deceased, to and including the 31st day of July, 1940, and respectfully shows to this Court, upon information and belief:

* * * * * * *

[fol. 65] "Schedule A," hereto annexed, contains an itemized statement of all moneys and other property belonging to the estate or fund now accounted for which have come into [fol. 66] its hands or which have been received by any person for it or on its behalf as such trustee together with all accrued income or interest thereon which at the time of receipt by it constituted principal in its hands.

"Schedule AI," hereto annexed, contains a full and complete statement of all increases derived from capital assets whether due to sale, liquidation, distribution or for any other reason.

"Schedule AII", hereto annexed, contains a full and complete statement of all interest, dividends, rents and other income received by accountant, together with the date of each such receipt and the amount thereof.

"Schedule B", hereto annexed, contains a full and complete statement of all decreases in the value of capital assets, whether such assets are reported in Schedule "A" or in Schedule "G", together with a statement of the cause of each such decrease and whether the decrease has been actually realized and, if so, the date of realization and whether it arose by reason of sale, liquidation, distribution, physical loss, physical damage or any other reason.

[fol. 67] "Schedule C", hereto annexed, contains an itemized statement of all moneys chargeable to principal and paid by accountant for administration, funeral and other

necessary expenses together with the reason and object of each such expenditure and the date of each such payment.

"Schedule Ca", hereto annexed, contains a general statement of facts in connection with the acquisition of properties acquired upon foreclosure of mortgages held by accountant or by deed in lieu of foreclosure thereof. (See Schedules "Cb" to "Cj").

"Schedule Cb", hereto annexed, contains an itemized statement of all transactions since May 13, 1936 in connection with premises 46 Noll Street, Brooklyn, N. Y., acquired upon foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom.

"Schedule Cc", hereto annexed, contains an itemized statement of all transactions since May 13, 1936 in connection with premises 1855 East 7th Street, Brooklyn, N. Y., acquired upon foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom.

"Schedule Cd", hereto annexed, contains an itemized statement of all transactions since May 13, 1936 in connection with premises 2022 East 9th Street, Brooklyn, N. Y., acquired upon foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom.

[fol. 68] "Schedule Ce", hereto annexed, contains an itemized statement of all transactions since May 13, 1936 in connection with premises 193 Bay 17th Street, Brooklyn, N. Y., acquired upon foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom.

"Schedule Cf", hereto annexed, contains an itemized statement of al transactions since May 13, 1936 in connection with premises 1441-3 66th Street, Brooklyn, N. Y., acquired by deed in lieu of foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom.

"Schedule Cg", hereto annexed, contains an itemized statement of all transactions since May 13, 1936 in con-

nection with premises 2047 East 27th Street, Brooklyn, N. Y., acquired by deed in lieu of foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom.

"Schedule Ch", hereto annexed, contains an itemized statement of all transactions since May 13, 1936 in connection with premises 240 Floyd Street, Brooklyn, N. Y., acquired upon foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom.

"Schedule Ci", hereto annexed, contains an itemized statement of all transactions in connection with premises 168 Morrison Avenue, West New Brighton, Staten Island, N. Y., acquired upon foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom and proceeds of sale thereof.

[fol. 69] "Schedule Cj", hereto annexed, contains an itemized statement of all transactions in connection with premises 41 Montrose Avenue, Brooklyn, N. Y., acquired by deed in lieu of foreclosure; also a statement of facts in connection therewith and an apportionment of the net rents therefrom and proceeds of sale thereof.

* * * * * * *

[fols. 70-71] "Schedule H", hereto annexed, contains an itemized statement showing all property constituting capital and remaining in the hands of accountant, including a statement of all uncollected receivables and property rights due to the estate or fund as of the 31st day of July, 1940, the last day of this account.

"Schedule H1", hereto annexed, contains an itemized statement showing all property constituting undistributed income remaining in the hands of accountant including a statement of all uncollected receivables and property rights due to the estate or fund constituting income as of the 31st day of July, 1940, the last day of this account.

* * * * * * *

[fol. 72] SUMMARY

AS TO PRINCIPAL

Accountant charges itself as follows:

With amount of all property orginally received to constitute principal as shown in Schedule "A"		$132,753.26
With amount of increases, as shown in Schedule "AI"		10.50
With amounts refunded to principal on account of advances (made by executor) for foreclosure expenses, etc. as follows:		
Premises 193 Bay 17th Street, Brooklyn, N. Y., as shown in Schedule "Ce" [page 103 herein]	$29.16	
Premises 1441–3 66th Street, Brooklyn, N. Y., as shown in Schedule "Cf" [page 108 herein]	311.72	340.88
		$133,104.64

Accountant credits itself as follows:

With amount of decreases, as shown in Schedule "B"		$5,186.12	
With amount of payments for administration expenses, chargeable against principal, as shown in Schedule "C"		766.76	
With amounts advanced (since May 13, 1936) from principal in connection with the following properties all situated in Brooklyn, N. Y., acquired by foreclosure or in lieu of foreclosure:			
Premises 46 Noll Street, as shown in Schedule "Cb" [page 88 herein]	$751.68		
Premises 1855 East 7th Street, as shown in Schedule "Cc" [page 93 herein]	420.98		
Premises 2022 East 9th Street, as shown in Schedule "Cd" [page 98 herein]	2,315.53		
Premises 2047 East 27th Street, as shown in Schedule "Cg" [page 114 herein]	*147.48*		
Premises 240 Floyd Street, as shown in Schedule "Ch" [page 119 herein]	*398.09*	*4,033.76*	*9,986.64*
Leaving a balance of principal on hand of consisting of the property set forth in Schedule "H", carried at inventory value of $123,229.10, subject to a cash overdraft of $155.70.		*111.10*	*$123,118.00*

[fol. 73]

AS TO INCOME

Accountant charges itself as follows:

With amount of all income received, as shown in Schedule "AII"		*$28,921.89*

Accountant credits itself as follows:

With amount of all payments for necessary expenses, including commissions, chargeable against income, as shown in Schedule "CII"	$1,154.99	
With amount of all payments to or for the account of beneficiaries from income, as shown in Schedule "FI"	24,679.45	25,834.44
Leaving a balance of income on hand of consisting of *$2,680.06* in cash and securities of $407.39, as set forth in Schedule "HI".		*$3,087.45*

The above balances are subject to the commissions of accountant estimated at $1,356.81, as per Schedule "K", and the expenses of this accounting.

The attached schedules, which are severally signed by accountant, are part of this account.

Dated: New York, N. Y., July 31st, 1940.

CITY BANK FARMERS TRUST COMPANY
By S. R. WALKER
Trust Officer

Attest:
CROSBY T. SMITH
Assistant Secretary,

MITCHELL, TAYLOR, CAPRON AND MARSH,
Attorneys for Accountant,
20 Exchange Place,
New York, N. Y.

[fol. 74]

SCHEDULE A

		Value as appraised in New York Estate Tax Proceeding
1936		
May 13	Received from Executor:	
	$5,000. Bond and Mortgage, Ole O. Odegard and wife, covering property 168 Morrison Avenue, West New Brighton, Staten Island, New York, past due, interest at 6% payable June and December 1, guaranteed by Bond and Mortgage Guarantee Company (December 1, 1934 interest unpaid) In foreclosure	$5,000 00
	$4,750. Bond and Mortgage, Joseph Cohen, covering property 41 Montrose Avenue, Brooklyn, past due, interest at 6% payable January and July 1, guaranteed by Bond and Mortgage Guarantee company (January 1, 1935 interest partially paid)	4,750 00
	The following premises acquired by Executor by foreclosure of mortgages thereon held by decedent at date of his death, carried at the appraised value of said mortgages at date of death:	
	Premises 46 Noll Street, Brooklyn, New York	3,200 00
	Premises 193 Bay 17th Street, Brooklyn, N. Y.	5,000 00
	Premises 240 Floyd Street, Brooklyn, New York	2,700 00
	Premises 1441-3 66th Street, Brooklyn, N. Y.	4,500 00
	Premises 1855 East 7th Street, Brooklyn, New York	5,250 00
	Premises 2022 East 9th Street, Brooklyn, New York	6,300 00
	Premises 2047 East 27th Street, Brooklyn, New York	3,187 50

[fol. 75]

SCHEDULE AI

PURCHASE MONEY MORTGAGE, CARMINE MARRONE, COVERING 41 MONTROSE AVENUE, BROOKLYN

				Increase
1939				
Dec. 18	Payment in reduction of principal		$50.00	
1940				
Apr. 8	do		50.00	
June 20	do		50.00	
			$150.00	
	Inventory value reduced		$150.00	—

[fol. 76]

SCHEDULE AII

BOND AND MORTGAGE, JOSEPH COHEN, COVERING 41 MONTROSE AVENUE, BROOKLYN

1936				
June 15	Balance of interest on $4,750. at 6% due January 1, 1935		$16.49	
15	On account interest on $4,750. due July 1, 1935	$13.51		
June 20	Payment on account of interest due July 1, 1935	7.23		
29	do	25.00		
July 28	do	55.00		
Aug. 25	Balance at 6%	41.76	142.50	
25	On account of interest due January 1, 1936	$3.24		
Nov. 18	do	55.00		
19	do	8.00	76.24	$235.23

PURCHASE MONEY MORTGAGE, CARMINE MARRONE, COVERING 41 MONTROSE AVENUE, BROOKLYN

1939				
Nov. 16	3 months interest on $3,200. at 5% to November 9, 1939		$40.00	
1940				
Apr. 8	3 months interest on $3,150. at 5% to February 9, 1939		39.38	
	Interest on $50. payment to December 18		.28	
June 20	3 months interest on $3,100. at 5% to May 9, 1939		38.75	
	Interest on $50. payment to April 8		.41	118.82

[fol. 77]

PREMISES 168 MORRISON AVENUE, WEST NEW BRIGHTON, STATEN ISLAND, NEW YORK (ACQUIRED BY FORECLOSURE SEE SCHEDULE Ci)

1938			
Aug. 25	Share of proceeds of sale allocated to income, per Schedule Ci		714 44

PREMISES 41 MONTROSE AVENUE, BROOKLYN, NEW YORK (ACQUIRED BY FORECLOSURE SEE SCHEDULE Cj)

1939			
Aug. 9	Share of proceeds sale allocated to income, consisting of $407.39 undivided interest (subject to a preferred interest of principal of $1,023.51) in $3,200. purchase money mortgage, Carmine Marrone, covering said premises, due August 9, 1944, interest at 5% payable February 9th quarterly, see Schedule Cj		407 39

NET RENTS UP TO 3% PER ANNUM ON PROPERTIES ACQUIRED BY FORECLOSURE:

Premises 46 Noll Street, Brooklyn, New York, per Schedule Cb	$207 61	
Premises 1855 East 7th Street, Brooklyn, New York, per Schedule Cc	630 00	
Premises 193 Bay 17th Street, Brooklyn, New York, per Schedule Ce	358 67	
Premises 1441-3 66th Street, Brooklyn, New York, per Schedule Cf	527 04	
Premises 2047 East 27th Street, Brooklyn, New York, per Schedule Cg	310 59	
Premises 240 Floyd Street, Brooklyn, New York, per Schedule Ch	134 43	2,168 34
		$28,921 89

[fol. 78]

SCHEDULE B

1938				Decrease
Aug. 25	Net share of proceeds of premises 168 Morrison Avenue, West New Brighton, Staten Island, New York, apportioned to principal, as per Schedule Ci (in addition to reimbursement for advances)	$2,812 78		
	Value of mortgage Ole O. Odegaard and wife (foreclosed per Schedule Ci) as per Schedule "A"	5,000 00	$2,187 22	
1939				
Aug. 9	Net share of proceeds of premises 41 Montrose Avenue, Brooklyn, New York, apportioned to principal, as per Schedule Cj, (in addition to reimbursement for advances)	$1,769 10		
	Value of mortgage Joseph Cohen (foreclosed per Schedule Cj) as per Schedule "A"	4,750 00	2,980 90	

[fol. 79] SCHEDULE Ca

Containing a General Statement of Facts in Connection With the Acquisition of Properties Acquired Upon Foreclosure of Mortgages Held by Accountant or by Deed in Lieu of Foreclosure Thereof. (See Schedules Cb to Cj)

As is set forth in Schedule A of the account of City Bank Farmers Trust Company, of its proceedings as executor of the last will and testament of Henry C. West, deceased to May 15, 1935 heretofore filed in this Court on or about the 17th day of June, 1935, in a proceeding brought by your accountant as such executor for the judicial settlement of its accounts as such, the estate of Henry C. West consisted in part of the following described bonds and mortgages:

$5,000. Bond and Mortgage of Ole O. Odegaard and Wife, covering property of 168 Morrison Avenue, West New Brighton, Staten Island, New York, due December 19, 1933, interest 5½% payable June and December 1, valued in said account at 100,

$7,000. Bond and Mortgage, Minnie Appel and Husband, covering property 1855 East 7th Street, Brooklyn, New York, due January 17, 1935, interest at 5½% payable June and December 1, valued in said account at 75,

$5,000. Bond and Mortgage, Maria Capcorosso, covering property 193 Bay 17th Street, Brooklyn, New York, due June 3, 1934, interest at 5½% payable May and November 1, valued in said account at 100,

$4,000. Bond and Mortgage, Mary A. O'Neill, covering property 46 Noll Street, Brooklyn, New York, due February 17, 1935, interest at 5½% payable May and November 1, valued in said account at 80,

$4,750. Bond and Mortgage, Joseph Cohen, covering property 41 Montrose Avenue, Brooklyn, New
[fol. 80] York, due October 2, 1933, interest at 5½% payable January and July 1, valued in said account at 100,

$3,000. Bond and Mortgage, Morris Pakulski, et ano, covering property 240 Floyd Street, Brooklyn, New York, due September 27, 1933, interest at 4% payable January and July 1, valued in said account at 90,

$4,250. Bond and Mortgage, Well-Bilt Building Corporation, covering property 2047 East 27th Street, Brooklyn, New York, due November 1, 1935, interest at 5½% payable May and November 1, valued in said account at 75,

$7,000. Bond and Mortgage, Charles Pollacek, covering property 2022 East 9th Street, Brooklyn, New York, due April 17, 1934, interest at 6% payable January, April, July and October 1, valued in said account at 90,

$4,500. Bond and Mortgage, Gaetano Loffredo and Maria Loffredo, covering property 1441/3 66th Street, Brooklyn, New York, due April 20, 1933, interest at 5½% payable June and December 1, valued in said account at 100.

As is set forth in Schedule CII of said account and in Schedules C-a and F of the supplemental account of City Bank Farmers Trust Company of its proceedings as said executor from May 15, 1935 to May 13, 1936 filed in said proceeding on or about the 29th day of June, 1936, and as further set forth herein, the properties covered by the aforementioned bonds and mortgages have been acquired by your accountant upon foreclosure or by deed in lieu of foreclosure.

The decree of this Court duly made and entered on the 10th day of August, 1936, judicially settling and allowing the account and supplemental account of proceedings of City Bank Farmers Trust Company, as executor as aforesaid, duly made and entered in this Court on the 10th day of August, 1936, provided in part as follows:

[fol. 81] "Further Ordered, Adjudged and Decreed that each of the properties received as a result of foreclosure and tarnsferred by said executor to itself as trustee under said decedent's will, be held in a separate account by the trustee, wherein all expenses and disbursements incurred in connection with the acquisition

of each property as shown in the account and supplemental account herein, together with any and all future receipts and disbursements in connection with each property, so that the same may be taken into consideration by the trustee in apportioning the proceeds received upon the ultimate sale of the respective properties between principal and income and that the rights of all persons interested in said trust be and the same hereby are reserved to assert upon any future accounting that any such receipts and disbursements whether made prior or subsequent to this accounting should be taken into consideration by the court in determining the proper apportionment of the proceeds of sale of said properties;"

Your accountant has managed these properties, received the rents therefrom, paid the operating and other expenses in connection therewith. Said receipts and disbursements since May 13, 1936 are hereinafter set forth in Schedules Cb to Cj, inclusive, together with a restatement, in so far as your accountant is advised is necessary for present purposes, of the receipts and disbursements prior to May 13, 1936, which were set forth in said account and supplemental account of your accountant as executor as aforesaid. Two of the properties so acquired, to wit, premises 168 Morrison Avenue, West New Brighton, Staten Island, New York, and 41 Montrose Avenue, Brooklyn, New York, have been sold by your accountant.

In Schedules Cb to Cj, inclusive, your accountant has set forth an apportionment of the income from such properties as have not been sold and of the income and proceeds of sale of such properties as have been sold in the manner your accountant is advised is proper under the laws of this State, and your accountant requests that the respective rights of the income beneficiaries and the remaindermen in such income and proceeds of sale be determined by the decree to be entered herein.

[fol. 82] As indicated above, each of said mortgages was guaranteed by Bond and Mortgage Guarantee Company. On the 2nd day of August, 1933, an order was entered in the Supreme Court of the State of New York, County of Kings, placing the company in rehabilitation and directing the Superintendent of Insurance of the State of New York to take possession thereof. Thereafter and on or about

the 31st day of December, 1937, an order was entered in the Supreme Court of the State of New York, Kings County, placing said company in liquidation, directing the Superintendent of Insurance of the State of New York to take possession of the property of said Bond and Mortgage Guarantee Company and further directing that the final date for the presentation of claims by certificate holders and creditors of said company should be the 30th day of September, 1938.

Your accountant accordingly filed with the said liquidator proofs of claim in connection with the guaranty of the aforesaid mortgages, and said claims have been allowed in varying amounts as is hereinafter set forth. Your accountant is informed and believes that the claims will not be paid in full but that from time to time dividends thereupon will be paid. Your accountant requests that the decree to be entered herein determine the respective rights of the income beneficiaries and the remaindermen in the amounts which may be so received and that your accountant be instructed by said decree accordingly.

City Bank Farmers Trust Company, by S. R. Walker, Trust Officer.

[fols. 83-84] SCHEDULE Cb

46 Noll Street, Brooklyn, N. Y.

The bond and mortgage on the above premises was in the principal amount of $4,000. bearing interest at the rate of 6% per annum and netting to the decedent and his estate 5½% per annum after the deduction of the one-half of one per cent charge of Bond and Mortgage Guarantee Company. The agency of this company was terminated pursuant to letter of your accountant dated July 20, 1934.

The owner having defaulted in the payment of the principal of the obligation, interest thereon from November 1, 1933 and taxes on the real property, your accountant brought an action in the Supreme Court of Kings County to foreclose the mortgage upon the premises. The property was bid in by your accountant at the foreclosure sale and was conveyed to your accountant by a Referee's deed made and delivered February 26, 1935.

The premises consist of a plot 25 feet by 100 feet in size and are improved by a three-story and cellar frame building containing two four-room apartments on each floor. The tenants of the apartments are required to furnish their own heat and hot water. At the date of the acquisition of the property it was vacant except for one apartment occupied by a janitor. Your accountant endeavored to sell the same but has been unable to do so and has been required to operate the property in the meantime. Your accountant was required to make extensive repairs in order to put the premises in a tenantable condition and in order to comply with orders of the Tenement House Department concerning the condition of the property.

Your accountant has filed proof of claim dated July 22, 1938, in connection with the guaranty of this mortgage, with the Superintendent of Insurance, as Liquidator of the Bond and Mortgage Guarantee Company. This claim was [fols. 85-86] in the amount of $7,680.59, and * * * was allowed in the amount of $3,680.59.

[fol. 87]

4—52

STATEMENT SUMMARIZING THE RENTS, CARRYING CHARGES, CAPITAL IMPROVEMENTS, COSTS OF ACQUIRING TITLE, ETC., BY FISCAL YEARS, FROM THE DATE OF ACQUISITION OF SAID PREMISES, AND A CALCULATION OF THE AMOUNT OF NET RENTS PAYABLE TO INCOME ACCOUNT

I	II	III	IV	V	VI	VII	VIII	IX
Period	Gross Rents	Carrying Charges	Net Rents	Net Deficit	Amount of Net Rents Transferred to Income (up to 3% of $4,000 face of mortgage)	Excess over 3%	Capital Improvements and Charges	Costs of Acquisition of Premises (foreclosure expenses and charges)
Fiscal year ending 2/25/36								
Per 1st account		$188.63						$1,411.97
Per Supp. account		214.19					$717.37	
Sub totals		$402.82	—	$402.82	—	—	$717.37	$1,411.97
Fiscal year ending 2/25/37								
Per Supp. account	$16.00	175.63					7.60	
Per this account	345.00	209.71					238.40	
Sub totals	$361.00	$385.34	—	$103.34	—	—	$167.00	—
Fiscal year ending 2/25/38	614.00	526.39	$87.61	—	$87.61		40.00	
Fiscal year ending 2/25/39	737.00	854.48	—	117.48	—	—	525.00	—
Fiscal year ending 2/25/40	843.00	679.09	163.91	—	120.00 undetermined (see note)	$43.91 undetermined (see note)	—	—
Period to 7/31/40	284.00	236.99	47.01	—			10.00	
Totals	$2,839.00	$3,464.11	$298.53	$623.64	$207.61	$43.91	$1,459.37	$1,411.97

[fol. 88]

STATEMENT SUMMARIZING THE AMOUNTS ADVANCED TO DATE FROM PRINCIPAL IN CONNECTION WITH SAID PROPERTY

Expenses of acquisition of title (foreclosure expenses and payments of liens on property at date of acquisition), per column IX		$1,411.97
Capital improvements and charges per column VIII		1,459.37
Operating deficits per column V		623.64
		$3,494.98
Less amount of net rents in excess of 3% per annum per column VII		43.91
Net sum advanced by principal to date		$3,451.07
Consisting of amounts advanced:		
Per Schedule "CII" of 1st account	$1,600.60	
Per Schedule "Ca" of Supplemental account	1,098.79	
During this accounting period	751.68	
	$3,451.07	

NOTE: There remains a balance of cash in this account of $47.01 consisting of net rents the allocation of which is not determinable until the end of the current fiscal year.

[fols. 89-90] SCHEDULE Cc

1855 East 7th Street, Brooklyn, N. Y.

The bond and mortgage on the above premises was in the principal amount of $7,000. bearing interest at the rate of 6% per annum and netting to the decedent and his estate 5½% per annum after the deduction of the one-half of one per cent charge of the Bond and Mortgage Guarantee Company. The agency of this company was terminated pursuant to letter of your accountant dated July 27, 1934.

The owner of the property having defaulted in the payment of the principal of the obligation, interest thereon from June 1, 1932, and taxes on the real property, your accountant brought an action in the Supreme Court, Kings County, to foreclose the mortgage upon the premises. The property was bid in by your accountant at the foreclosure sale and was conveyed to your accountant by a Referee's deed made and delivered September 24, 1935.

Your accountant is informed and believes that the Bond and Mortgage Guarantee Company advanced to the decedent the installment of interest due December 1, 1932, pursuant to the terms of the guaranty.

The premises consist of a plot of ground approximately 33 feet by 120 feet in size and are improved by a one and

one-half story and cellar frame and stucco private dwelling containing eight rooms and two baths and by a garage at the rear of the plot. At the date of the acquisition of the property it was occupied by a tenant holding under a lease executed by the holder of the second mortgage upon the property. This tenant remained on the premises under leases from your accountant until March 30, 1939. Your accountant has endeavored to sell the property but has been unable to do so and in the meantime has operated the same.

Your accountant has filed proof of claim dated July 22, 1938, in connection with the guaranty of this mortgage, with the Superintendent of Insurance, as Liquidator of the Bond and Mortgage Guarantee Company. This claim was in the amount of $10,292.36 and • • •

[fol. 91] was allowed in the amount of $3,294.03.

[fol. 92]

STATEMENT SUMMARIZING THE RENTS, CARRYING CHARGES, CAPITAL IMPROVEMENTS, COSTS OF ACQUIRING TITLE, ETC., BY FISCAL YEARS, FROM THE DATE OF ACQUISITION OF SAID PREMISES, AND A CALCULATION OF THE AMOUNT OF NET RENTS PAYABLE TO INCOME ACCOUNT

I	II	III	IV	V	VI	VII	VIII	IX
Period	Gross Rents	Carrying Charges	Net Rents	Net Deficit	Amount of Net Rents Transferred to Income (up to 3% of $7,000 face of mortgage)	Excess over 3%	Capital Improvements and Charges	Costs of Acquisition of Premises (foreclosure expenses and charges)
Fiscal year ending 9/23/36								
Per 1st account and supp. account	$330.00	$283.23					$69.71	$2,044.89
Per this account	290.00	14.50						(219.24)
Sub totals	$620.00	$297.73	$322.27	—	$210.00	$112.27	$69.71	$1,825.65
Fiscal year ending 9/23/37	700.00	335.65	364.35	—	210.00	154.35	35.36	
Fiscal year ending 9/23/38	747.58	522.27	225.31	—	210.00	15.31	19.46	
Fiscal year ending 9/23/39	325.33	1,029.87	—	$704.54	—	—	18.58	
Period to 7/31/40	636.67	415.59	221.08	—	Undetermined (see note)	Undetermined (see note)	97.44	
Totals	$3,029.58	$2,601.11	$1,133.01	$704.54	$630.00	$281.93	$240.55	$1,825.65

[Note: Figures in parentheses is credit.]

[fol. 93]

STATEMENT SUMMARIZING THE AMOUNTS ADVANCED TO DATE FROM PRINCIPAL IN CONNECTION WITH SAID PROPERTY

Expenses of acquisition of title (foreclosure expenses and payments of liens on property at date of acquisition), per column IX		$1,825.65
Capital improvements and charges, per column VIII		240.55
Operating deficits, per column V		704.54
		$2,770.74
Less amount of net rents in excess of 3% per annum, per column VII		281.93
Net sum advanced by principal to date		$2,488.81
Consisting of amounts advanced:		
Per Schedule "C" of 1st account	$100.00	
Per Schedule "Ca" of Supplemental account	1,967.83	
During this accounting period	420.98	
	$2,488.81	
NOTE: There remains a balance of cash in this account of consisting of net rents the allocation of which is not determinable until the end of the current fiscal year.	$221.08	

[fol. 94]

SCHEDULE Cd

2022 East 9th Street, Brooklyn, N. Y.

The bond and mortgage on the above premises was in the principal amount of $7,000. bearing interest at the rate of 6% per annum and netting to the decedent and his estate 5½% per annum after the deduction of the one-half of one per cent charge of the Bond and Mortgage Guarantee Company. The agency of this company was terminated pursuant to letter of your accountant dated September 12, 1934.

The owner having defaulted in the payment of the principal obligation, interest thereon from April 1, 1934 and taxes on the real property your accountant brought an action in the Supreme Court, Kings County, to foreclose the mortgage upon the premises. The property was bid in by your accountant at the foreclosure sale and was conveyed to your accountant by a Referee's deed made and delivered October 1, 1935.

The premises consist of a plot of ground 60 feet by 100 feet in size and are improved by a two and one-half story frame detached private dwelling containing ten rooms and bath, and by a garage at the rear of the plot. At the date of the acquisition of the property it was vacant: Your accountant has been unable to sell the property and has endeavored to secure a tenant for the same but has been

unable to do so to the date of this account. Your accountant installed a caretaker in the premises on June 1, 1936 in order to protect the same against depreciation.

Your accountant has filed proof of claim dated July 22, 1938, in connection with the guaranty of this mortgage, with the Superintendent of Insurance, as Liquidator of the Bond and Mortgage Guarantee Company. This claim was in the amount of $11,093.16 and * * *

[fols. 95-96] was allowed in the amount of $5,593.16.

[fol. 97]

STATEMENT SUMMARIZING THE RENTS, CARRYING CHARGES, CAPITAL IMPROVEMENTS, COSTS OF ACQUIRING TITLE, ETC., BY FISCAL YEARS, FROM THE DATE OF ACQUISITION OF SAID PREMISES, AND A CALCULATION OF THE AMOUNT OF NET RENTS PAYABLE TO INCOME ACCOUNT

I	II	III	IV	V	VI	VII	VIII	IX
Period	Gross Rents	Carrying Charges	Net Rents	Net Deficit	Amount of Net Rents Transferred to Income (up to 3% of $7,000 face of mortgage)	Excess over 3%	Capital Improvements and Charges	Costs of Acquisition of Premises (foreclosure expenses and charges)
Fiscal year ending 9/30/36								
Per Supp. account	—	$345.59					$3.47	$1,578.07
Per this account	—	18.89					76.91	
Sub totals	—	*$372.48*	—	*$372.48*	—	—	*$72.38*	$1,578.07
Fiscal year ending 9/30/37	—	494.89		494.89	—	—	15.00	
Fiscal year ending 9/30/38	—	539.70	—	539.70	—	—	—	
Fiscal year ending 9/30/39	$25.00	638.44	—	613.44	—	—	—	
Period to 7/31/40	45.00	589.70	—	541.70	—	—	12.00	
Totals	$70.00	*$2,635.21*	—	*$2,565.21*	—	—	*$99.38*	$1,578.07

[fol. 98]

STATEMENT SUMMARIZING THE AMOUNTS ADVANCED TO DATE FROM PRINCIPAL IN CONNECTION WITH SAID PROPERTY.

Expenses of acquisition of title (foreclosure expenses and payments of liens on property at date of acquisition), per column IX		$1,578.07
Capital improvements and charges, per column VIII		99.38
Operating deficits, per column V		2,565.21
Net sum advanced by principal to date		$4,242.66
Consisting of amounts advanced:		
Per Schedule "Ca" of Supplemental account	$1,927.13	
During this accounting period	2,315.53	
	$4,242.66	

[fol. 99] SCHEDULE Ce

193 Bay 17th Street, Brooklyn, N. Y.

The bond and mortgage on the above premises was in the principal amount of $5,000, bearing interest at the rate of 6% per annum and netting to the decedent and his estate 5½% per annum after the deduction of the one-half of 1% charge of Bond and Mortgage Guarantee Company. The agency of this company was terminated pursuant to letter of your accountant dated January 23, 1935.

The owner having defaulted in the payment of the principal obligation, interest thereon from May 1, 1934, and taxes upon the real property, your accountant brought an action in the Supreme Court, Kings County, to foreclose the mortgage upon the premises. The property was bid in by your accountant at the foreclosure sale and was conveyed to your accountant by Referee's deed made and delivered September 16, 1935.

The premises consist of an irregular plot of ground having a frontage of 48.6 feet and a depth of about 96 feet and are improved by a two-story and cellar, frame, stucco covered, detached private dwelling containing seven rooms and bath. At the date of the acquisition of the property it was occupied by the former owner but shortly thereafter was vacated by him. Your accountant was required to spend substantial sums in rehabilitating the property in order that a tenant might be secured and was successful in securing a tenant in the spring of 1936. Your accountant has endeav-

ored to sell the property but has been unable to do so, and has operated the same to the date of this account.

Your accountant has filed proof of claim dated July 22, 1938 in connection with the guaranty of this mortgage in the proceeding for the liquidation of Bond and Mortgage Guarantee Company. This claim was in the amount of [fols. 100-101] $7,319.18 and * * * was allowed in the sum of $1,119.18.

[fol. 102]

STATEMENT SUMMARIZING THE RENTS, CARRYING CHARGES, CAPITAL IMPROVEMENTS, COSTS OF ACQUIRING TITLE, ETC., BY FISCAL YEARS, FROM THE DATE OF ACQUISITION OF SAID PREMISES, AND A CALCULATION OF THE AMOUNT OF NET RENTS PAYABLE TO INCOME ACCOUNT

I	II	III	IV	V	VI	VII	VIII	IX
Period	Gross Rents	Carrying Charges	Net Rents	Net Deficit	Amount of Net Rents Transferred to Income (up to 3% of $5,000 face of mortgage)	Excess over 3%	Capital Improvements and Charges	Costs of Acquisition of Premises (foreclosure expenses and charges)
Fiscal year ending 9/15/36								
Per Supp. account	$85.00	$285.68					$343.81	$1,021.38
Per this account	160.00	8.00						
Sub totals	$245.00	$293.68	—	$48.68	—	—	$343.81	$1,021.38
Fiscal year ending 9/15/37	480.00	352.80	$127.20	—	$127.20	—	15.00	
Fiscal year ending 9/15/38	400.42	318.95	81.47	—	81.47	—	—	
Fiscal year ending 9/15/39	481.41	304.25	177.16	—	150.00	$27.16	—	
Period to 7/31/40	482.16	312.69	169.47	—	Undetermined (see note)	Undetermined (see note)	135.00	
Totals	$2,088.99	$1,582.37	$555.30	$48.68	$358.67	$27.16	$493.81	$1,021.38

[fol. 103]

STATEMENT SUMMARIZING THE AMOUNTS ADVANCED TO DATE FROM PRINCIPAL IN CONNECTION WITH SAID PROPERTY

Expenses of acquisition of title (foreclosure expenses and payments of liens on property at date of acquisition), per column IX		$1,021.38
Capital improvements and charges, per column VIII		493.81
Operating deficit, per column V		48.68
		$1,563.87
Less amount of net rents in excess of 3% per annum, per column VII		27.16
Net sum advanced by principal to date		$1,536.71
Consisting of amounts advanced:		
Per Schedule "Ca" of Supplemental account	$1,565.87	
Refunded during this accounting period	29.16	
	$1,536.71	
NOTE: There remains a balance of cash in this account of consisting of net rents, the allocation of which is not determinable until the end of the current fiscal year.	$169.47	

[fol. 104] SCHEDULE Cf

1441-3 66th Street, Brooklyn, N. Y.

The bond and mortgage on the above premises was in the principal amount of $4,500. bearing interest at the rate of 6% per annum, netting to the decedent and his estate 5½% per annum after the deduction of one-half of 1% charge of the Bond and Mortgage Guarantee Company. The agency of this company was terminated pursuant to letter of your accountant dated June 25, 1935.

The owner defaulted in the payment of the principal obligation, the interest thereon from December 1, 1934 and taxes on the real property, and your accountant as executor accepted a deed to the premises from the then owners of the premises in lieu of foreclosure, which deed was made and delivered November 8, 1935.

The premises consist of a plot of ground 43 x 100 feet in size and are improved by a three-story and cellar, brick building consisting of one store on the first floor with an apartment of four rooms, two three-room apartments on the second floor and one six-room apartment on the third floor and by a one-car frame garage in the rear of the apartment. The tenants of the apartments are required to furnish their own heat and hot water.

At the date of the acquisition of the property, the premises were fully occupied, but within a few weeks thereafter the two tenants of the second floor apartments vacated. Your accountant was required to make extensive repairs in order that the premises might be placed in a tenantable condition and in order to comply with an order of the Tenement House Department concerning the condition of the property. Your accountant has been unable to sell the premises and in the meantime has operated the same.

Your accountant filed proof of claim, dated July 22, 1938, in connection with the guaranty of this mortgage in the proceeding for the Liquidation of Bond and Mortgage Guarantee Company. This claim was in the amount of $6,132.58, and * * *

[fols. 105-106] was allowed in the amount of $532.59.

[fol. 107]

STATEMENT SUMMARIZING THE RENTS, CARRYING CHARGES, CAPITAL IMPROVEMENTS, COSTS OF ACQUIRING TITLE, ETC., BY FISCAL YEARS, FROM THE DATE OF ACQUISITION OF SAID PREMISES, AND A CALCULATION OF THE AMOUNT OF NET RENTS PAYABLE TO INCOME ACCOUNT

I	II	III	IV	V	VI	VII	VIII	IX
Period	Gross Rents	Carrying Charges	Net Rents	Net Deficit	Amount of Net Rents Transferred to Income (up to 3% of $4,500 face of mortgage)	Excess over 3%	Capital Improvements and Charges	Costs of Acquisition of Premises (foreclosure expenses and charges)
Fiscal year ending Nov. 7, 1936								
Per Supp. Account	$293.00	$296.36					$472.22	$734.05
Per this Account	480.50	167.25					83.00	
Sub totals	$773.50	$551.36	$222.14	—	$135.00	$87.14	$467.47	$734.05
Fiscal year ending Nov. 7, 1937	740.50	618.46	122.04	—	122.04	—	—	
Fiscal year ending Nov. 7, 1938	1,032.02	752.80	279.22	—	135.00	144.22	—	
Fiscal year ending Nov. 7, 1939	864.06	652.81	211.25	—	135.00	76.25	4.00	
Period to July 31, 1940	649.77	337.60	312.17	—	Undetermined (see note)	Undetermined (see note)	—	
Totals	$4,059.85	$2,913.03	$1,146.82	—	$527.04	$307.61	$471.47	$734.05

[fol. 108]

STATEMENT SUMMARIZING THE AMOUNTS ADVANCED TO DATE FROM PRINCIPAL IN CONNECTION WITH SAID PROPERTY

Expenses of acquisition of title (expenses in lieu of foreclosure and payments of liens on property at date of acquisition), per column IX		$734.05
Capital improvements and charges, per column VIII		471.47
		1,205.52
Less amount of net rents in excess of 3% per annum, per column VII		307.61
Net sum advanced by principal to date		$897.91
Consisting of amounts advanced:		
Per Schedule "Ca" of Supplemental Account	$1,209.63	
Refunded during this accounting period	311.72	
	$897.91	
NOTE: There remains a balance of cash in this account of consisting of net rents, the allocation of which is not determinable until the end of the current fiscal year.	$312.17	

[fols. 109-110] SCHEDULE Cg

2047 East 27th Street, Brooklyn, N. Y.

The bond and mortgage on the above premises was in the principal amount of $4,250, bearing interest at the rate of 6% per annum, and netting to the decedent and his estate 5½% per annum after the deduction of the one-half of one per cent. charge of Bond and Mortgage Guarantee Company. The agency of this company was terminated pursuant to letter of your accountant dated August 8, 1934.

The owner having defaulted in the payment of the principal obligation, interest thereon from November 1, 1932, and taxes on the real property, your accountant authorized the institution of an action to foreclose the mortgage upon the premises, but the same was not pressed to conclusion since upon the offer of the owner the property was acquired by your accountant by deed in lieu of foreclosure made and delivered January 22, 1936.

The premises consist of a plot of ground 18.9 feet by 100 feet in size and are improved by a two-story and cellar, brick attached private dwelling containing six rooms and bath. At the date of the acquisition of the property it was vacant, but shortly thereafter a tenant was secured. Your accountant has endeavored to sell the property, but has

been unable to do so and, in the meantime, has operated the same.

Your accountant has filed proof of claim dated July 22nd, 1938, in connection with the guaranty of this mortgage in the proceeding for the liquidation of Bond and Mortgage Guarantee Company. The claim was in the amount of [fols. 111-112] $7,293.25, and * * * was allowed in the sum of $3,293.25.

[fol. 113]

STATEMENT SUMMARIZING THE RENTS, CARRYING CHARGES, CAPITAL IMPROVEMENTS, COSTS OF ACQUIRING TITLE, ETC., BY FISCAL YEARS, FROM THE DATE OF ACQUISITION OF SAID PREMISES, AND A CALCULATION OF THE AMOUNT OF NET RENTS PAYABLE TO INCOME ACCOUNT

I	II	III	IV	V	VI	VII	VIII	IX
Period	Gross Rents	Carrying Charges	Net Rents	Net Deficit	Amount of Net Rents Transferred to Income (up to 3% of $4,250 face of mortgage)	Excess over 3%	Capital Improvements and Charges	Costs of Acquisition of Premises (payments in lieu of foreclosure and charges)
Fiscal year ending 1/31/37								
Per Supp. account	$90.00	$114.58					$137.02	$1,605.23
Per this account	405.00	129.69					207.54	
Sub totals	$495.00	*$253.27*	*$241.73*	—	$127.50	*$114.23*	*$335.56*	$1,605.23
Fiscal year ending 1/21/38	467.50	*401.58*	*65.92*	—	*65.92*	—	*168.78*	
Fiscal year ending 1/21/39	437.50	347.51	89.99	—	89.99	—	*(81.03)*	
Fiscal year ending 1/21/40	606.88	579.70	27.18	—	27.18	—	—	
Period to 7/31/40	150.00	105.74	44.26	—	Undetermined (see note)	Undetermined (see note)	—	
Totals	$2,156.88	*$1,687.80*	*$469.08*	—	*$310.59*	*$114.23*	*$423.31*	$1,605.23

[NOTE: Figure in parentheses is credit.]

[fol. 114]

STATEMENT SUMMARIZING THE AMOUNTS ADVANCED TO DATE FROM PRINCIPAL IN CONNECTION WITH SAID PROPERTY

Expenses of acquisition of title (expenses in lieu of foreclosure and payments of liens on property at date of acquisition), per column IX		$1,605.23
Capital improvements and charges, per column VIII		423.31
		$2,028.54
Less amount of net rents in excess of 3% per annum, per column VII		114.23
		$1,914.31
Consisting of amounts advanced:		
Per Schedule "Ca" of Supplemental account	$1,766.83	
During this accounting period	147.48	
	$1,914.31	
NOTE: There remains a balance of cash in this account of consisting of net rents, the allocation of which is not determinable until the end of the current fiscal year.	$44.26	

[fol. 115] SCHEDULE Ch

240 Floyd Street, Brooklyn, N. Y.

The bond and mortgage on the above premises was in the principal amount of $3,000. bearing interest at the rate of 6% per annum and netting to the decedent and his estate 5½% per annum after the deduction of the one-half of one per cent. charge of Bond and Mortgage Guarantee Company. The agency of this company was terminated pursuant to letter of your accountant dated July 5, 1934.

The owner of the property encountered difficulties in maintaining the property and paying interest upon the mortgage and it was agreed by means of a letter dated October 22, 1934, with the then owner of the property that the interest rate might be reduced to 4% per annum. Interest at this rate was paid to July 1, 1935. For the owner's default in payment of the principal obligation and interest thereon from July 1, 1935, and taxes on the real property, your accountant commenced an action in the Supreme Court, Kings County, to foreclose the mortgage upon the premises. The property was bid in by your accountant at the foreclosure sale and was conveyed to your accountant by a Referee's deed made and delivered May 8, 1936.

The premises consist of a plot of ground 25 feet by 100 feet in size and are improved by a three-story and cellar, frame apartment building containing one apartment of four rooms and bath on each of the first and second floors and one of five rooms and bath on the third floor. The tenants of the apartments are required to furnish their own heat and hot water.

Your accountant has been unable to sell the premises and in the meantime has operated the same. At the date of acquisition the premises were fully occupied, all of the tenants continuing as such.

Your accountant has filed proof of claim dated July 22, 1938, in connection with the guaranty of this mortgage, with the Superintendent of Insurance, as Liquidator of the Bond and Mortgage Guarantee Company. This claim was in the [fols. 116-117] amount of $4,553.42 and * * * was allowed in the amount of $1,553.42.

[fol. 118]

STATEMENT SUMMARIZING THE RENTS, CARRYING CHARGES, CAPITAL IMPROVEMENTS, COSTS OF ACQUIRING TITLE, ETC., BY FISCAL YEARS, FROM THE DATE OF ACQUISITION OF SAID PREMISES, AND A CALCULATION OF THE AMOUNT OF NET RENTS PAYABLE TO INCOME ACCOUNT

I	II	III	IV	V	VI	VII	VIII	IX
Period	Gross Rents	Carrying Charges	Net Rents	Net Deficit	Amount of Net Rents Transferred to Income (up to 3% of $3,000 face of mortgage)	Excess over 3%	Capital Improvements and Charges	Costs of Acquisition of Premises (foreclosure expenses and charges)
Fiscal year ending 5/7/37	$492.00	*$475.46*	*$16.54*	—	*$16.54*	—	*$288.52*	$849.79
Fiscal year ending 5/7/38	494.50	425.70	68.80	—	68.80	—	74.50	
Fiscal year ending 5/7/39	554.00	555.07	—	$1.07	—	—	29.00	
Fiscal year ending 5/7/40	490.04	440.95	49.09	—	49.09	—	5.00	
Period to 7/31/40	127.50	28.05	99.45	—	Undetermined (see note)	Undetermined (see note)	—	
Totals	$2,158.04	*$1,925.23*	*$233.88*	$1.07	*$134.43*	—	*$397.02*	$849.79

[fol. 119]

STATEMENT SUMMARIZING THE AMOUNTS ADVANCED TO DATE FROM PRINCIPAL IN CONNECTION WITH SAID PROPERTY

Expenses of acquisition of title (foreclosure expenses and payments of liens on property at date of acquisition), per column IX		$849.79
Capital improvements and charges, column VIII		397.02
Operating deficit, per column V		1.07
		$1,247.88
Consisting of amounts advanced per Schedule "Ca" of supplemental account	$849.79	
During this accounting period	398.09	
	$1,247.88	
NOTE: There remains a balance of cash in this account of consisting of net rents, the allocation of which is not determinable until the end of the current fiscal year.	$99.45	

[fols. 120-121] SCHEDULE Ci

168 Morrison Avenue, West New Brighton, Staten Island, N. Y.

"The bond and mortgage on the above premises was in the principal amount of $5,000. bearing interest at the rate of 6% per annum, netting to the decedent and his estate 5½% per annum after the deduction of the one-half of one per cent. charge of Bond and Mortgage Guarantee Company. The agency of this company was terminated pursuant to letter of your accountant dated October 16, 1934.

The owner having defaulted in the payment of the principal of the obligation, interest thereon from June 1, 1934, and taxes upon the real property, your accountant brought an action in the Supreme Court, Richmond County, to foreclose the mortgage upon the premses. The property was bid in by your accountant at the foreclosure sale and was conveyed to your accountant by a referee's deed made and delivered March 5, 1937.

The premises consist of a plot of ground 35 feet by 100 feet in size and are improved by a 2½ story and cellar, frame and stucco, one-family detached dwelling, containing seven rooms, bath and porch and by a frame one-car garage.

At the date of the acquisition of the property it was occupied by a tenant at a rental of $40. a month. The rental was subsequently increased to the sum of $45. a month. In the spring of 1937, substantial exterior painting and repairs

and decoration of the interior were undertaken, in order that the property might be preserved and its appearance improved for purposes of sale. The property was sold and conveyed on August 25, 1939, for a consideration of $4,500. payable entirely in cash.

Your accountant filed a proof of claim in connection with the guaranty of this mortgage, dated July 22, 1938, in the proceeding for the liquidation of Bond and Mortgage Guarantee Company. This claim was in the amount of $6,691.18 and * * *

[fol. 122] after negotiation, was allowed in the amount of $1,691.18.

RECAPITULATION

I	II	III	IV	V	VI
Period	*Gross Rents*	*Carrying Charges*	*Net Rents*	*Capital Improvements and Charges*	*Costs of acquisition (foreclosure expenses and charges on property)*
Fiscal year ending 3/4/38	$470.00	$237.70	$232.30	$367.80	$604.07
Period from 3/5/38 to date of sale 8/25/38	270.70	162.83	107.87	4.08	
	$740.70	$400.53	$340.17	$371.88	$604.07

[fol. 123]

STATEMENT SHOWING THE NET PROCEEDS OF SALE OF SAID PROPERTY:

1938				
Aug. 1	Received from Louis P. Orlemann initial payment on account of purchase price		$500.00	
26	Received from Amy Orlemann balance of purchase price		4,000.00	
			$4,500.00	
	Less the following expenses in connection with sale:			
1938				
Sept. 12	Paid Cornelius G. Kolff, Inc., broker's commission	$225.00		
12	Paid Mitchell, Taylor, Capron & Marsh, attorneys' services and disbursements re sale	112.00	337.00	
	Net proceeds of sale			$4,163.00

STATEMENT OF APPORTIONMENT, BETWEEN PRINCIPAL AND INCOME OF THE NET SUM REALIZED FROM SAID PROPERTY:

Net proceeds of sale as above		$4,163.00
Less reimbursement of principal advances:		
Foreclosure expenses and charges, Column VI	$604.07	
Capital improvements and charges, Column V	371.88	
	$975.95	
Less net rents, Column IV	340.17	635.78
Net sum to be apportioned		$3,527.22
Face amount of foreclosed mortgage	$5,000.00	
Interest thereon at 6% from June 1, 1934 (date to which interest was paid) to August 25, 1938, date of sale	1,270.00	
	$6,270.00	
Principal is entitled to 5,000/6,270 of $3,527.22 or (transferred to Schedule "B" of account)		$2,812.78
Income is entitled to 1,270/6,270 of $3,527.22 or (transferred to Schedule "AII" of account)		714.44
		$3,527.22

[fol. 124] SCHEDULE Cj

41 Montrose Avenue, Brooklyn, N. Y.

The bond and mortgage on the above premises was in the principal amount of $4,750. bearing interest at the rate of 6%, netting to the decedent and his estate 5½% per annum after the deduction of the one-half of one per cent. charge of Bond and Mortgage Guarantee Company. The agency of this Company was terminated pursuant to letter of your accountant dated August 8, 1934.

Your accountant instituted an action to foreclose the mortgage upon the premises by a summons and complaint dated November 24, 1934, in which action an order was entered appointing a receiver of the property. This action was not, however, pressed to judgment and the property was acquired on December 23, 1936, by deed in lieu of foreclosure, from Leonarda Godino, the then owner of the premises, the receiver in the meantime having accounted and been dischargd.

The premises consist of a plot of ground 25 feet by 100 feet in size and are improved by a three-story and cellar, frame building, consisting of two stores on the first floor and two apartments each on the second and third floors.

The tenants of such apartments were required to furnish their own heat and hot water.

At the date of the acquisition of the property, interest from July 1, 1935 was unpaid, except for $76.24 paid on account thereof.

At the date of the acquisition of the property, one of the stores was rented, one apartment was occupied by the owner and two of the other apartments were rented. Within a short time, however, one of these tenants vacated. Your accountant endeavored to sell the property, operating the same in the meanwhile and making extensive repairs to the property in order to comply with orders of the Tenement House Department and to place the property in a tenantable condition.

The property was sold and conveyed on August 9, 1939, for a consideration of $4,000. made up of cash in the amount of $800. and a purchase money bond and mortgage maturing in five years in the amount of $3,200. with interest [fols. 125-126] payable quarterly at the rate of 5% per annum and amortization payments of $50. to be made on each interest date. At the date of this account, interest on said purchase money mortgage was paid to May 9th, 1940, and $150. had been paid in amortization.

Your accountant has filed a proof of claim dated July 22, 1938 in connection with the guaranty of this mortgage in the proceeding for the liquidation of Bond and Mortgage Guarantee Company. This claim was in the amount of $6,725.56 and * * * was allowed in the amount of $2,725.56.

[fol. 127]

RECAPITULATION

I	II	III	IV	V	VI
Period	*Gross Rents*	*Carrying Charges*	*Net Rents*	*Capital Improvements and Charges*	*Costs of acquisition (in lieu of foreclosure)*
Fiscal year ending 12/22/37	$254.00	*$472.65*	*($218.65)*	*$998.09*	$265.43
Fiscal year ending 12/22/38	759.00	*922.83*	*136.17*	*319.25*	
Period to 8/9/39 date of sale	483.20	325.86	157.34	-0-	
	$1,496.20	*$1,421.34*	*$74.86*	*$1,317.34*	$265.43

[NOTE: Figures in parentheses are deficits.]

STATEMENT SHOWING THE NET PROCEEDS OF SALE OF SAID PROPERTY:

1939				
Aug. 7	Received from Carmine Marrone initial payment on purchase price		$300.00	
17	Received from Carmine Marrone balance of purchase price as follows:			
	Purchase money mortgage interest at 5% payable quarterly with $50. quarterly amortization, balance principal due August 9, 1944	$3,200.00		
	Cash	500.00	3,700.00	
			$4,000.00	
	Less the following expenses of sale:			
17	Paid Herbert Zarnikauer, broker's commission	$200.00		
17	Paid Mitchell, Taylor, Capron & Marsh, attorneys' services and disbursements re sale	115.60	315.60	
	Net proceeds of sale			$3,684.40

[fol. 128]

STATEMENT OF APPORTIONMENT BETWEEN PRINCIPAL AND INCOME, OF THE NET SUM REALIZED FROM SAID PROPERTY:

Net proceeds of sale as above:			
Purchase money mortgage		$3,200.00	
Cash		484.40	$3,684.40
Less reimbursement of principal advances:			
Costs of acquisition, etc., Column VI		$265.43	
Capital improvements, etc., Column V		*1,317.34*	
		$1,582.77	
Less net rents, Column IV		*74.86*	1,507.91
			$2,176.49
Net sum to be apportioned consisting of $3,200. purchase money mortgage in which principal has a prior interest of $1,023.51 in reimbursement of advances			
Face amount of foreclosed mortgage		$4,750.00	
Interest thereon at 6% from July 1, 1935 to August 9, 1939	$1,170.08		
Less paid on account	76.24	1,093.84	
		$5,843.84	

	Interest in Purchase money mortgage subject to prior interest
Principal is entitled to 4,750/5,843.84ths of $2,176.49 or (Transferred to Schedule "B" of account)	$1,769.10
Income is entitled to 1,093.84/5,843.84ths of $2,176.49 or (transferred to Schedule "AII" of account)	407.39
	$2,176.49

[fol. 129] SCHEDULE H

In setting forth inventory values of the items listed below, accountant is not to be understood as representing that the inventory value set opposite any of the items below represents the market value of such item. Your accountant is of the opinion that at least in some instances the market value is less than the inventory value.

	Inventory Value
$4,375. Home Owners Loan Corporation, Series "M", 1½s due June 1, 1947–45, at cost	$4,480.27
$5,300. United States Treasury, 2½s due September 15, 1952–50, at cost	5,538.72
$3,000. Bond and Mortgage, Realty Sales Company, covering property 1138 East 2nd Street, Brooklyn, New York, past due, interest at 6% payable May and November 1, guaranteed by Bond and Mortgage Guarantee Company	3,000.00
$4,750. Bond and Mortgage, Ida Sommer and husband, covering property 85 West End Avenue, Brooklyn, New York, past due, interest at 5% payable March 1st quarterly, guaranteed by Bond and Mortgage Guarantee Company	4,750.00
$4,250. Bond and Mortgage, Novodoff Construction Company Inc., covering property 4510 Avenue "L", Brooklyn, New York, past due, interest at 6% payable February 1st quarterly	4,250.00
$5,100. Bond and Mortgage, Luigi Principe and wife, covering property 193 Skillman Street, Brooklyn, New York, past due, interest at 5½% payable January 1st quarterly, guaranteed by Bond and Mortgage Guarantee Company	5,100.00
$4,650. Bond and Mortgage, Esther Rascofsky and husband, covering property 318–20 Williams Avenue, Brooklyn, New York, past due, interest at 5% payable May and November 1st, guaranteed by Bond and Mortgage Guarantee Company, inventory value	4,100.00
[fol. 130]	
$6,000. Bond and Mortgage, Elizabeth Ennis, covering property 2109 Dean Street, Brooklyn, New York, past due, interest at 4% payable March 1st quarterly, guaranteed by Bond and Mortgage Guarantee Company	6,000.00
$12,500. Bond and Mortgage, Isidore Herleth and wife, covering property 88 Nassau Street and 211 Pearl Street, Brooklyn, New York, past due, interest at 6% payable June and December 1st, guaranteed by Bond and Mortgage Guarantee Company	12,500.00
$4,750. Bond and Mortgage, Dickel Construction Company, covering property 8630–78th Street, Woodhaven, Long Island, past due, interest at 6% payable January and July 1st, guaranteed by Bond and Mortgage Guarantee Company	4,750.00
$4,250. Bond and Mortgage, John W. McGrath, covering property 502 Hancock Street, Brooklyn, New York, past due, interest at 6% payable January and July 1st, guaranteed by Bond and Mortgage Guarantee Company	4,250.00
$8,000. Bond and Mortgage, 95th Street Building Corporation, covering property 1102 Winthrop Street, Brooklyn, New York, past due, interest at 5% payable May and November 1, guaranteed by Bond and Mortgage Guarantee Company	8,000.00
$7,000. Bond and Mortgage, Thomas W. Lewis, covering property 10 West Drive, Plandome, Hempstead, Long Island, past due, interest at 6% payable January 1st quarterly, guaranteed by Bond and Mortgage Guarantee Company	7,000.00
$3,950. Bond and Mortgage, Saider and Mary Tolkochoff, covering property 400 Wythe Avenue, Brooklyn, New York, past due, interest at 5% payable February 1st quarterly, guaranteed by Bond and Mortgage Guarantee Company	3,950.00
$3,280. Bond and Mortgage, Glenn H. Frost and Mary E. Frost, covering property 1202 Avenue "N", Brooklyn, New York, past due, interest at 6% June and December 1st, guaranteed by Bond and Mortgage Guarantee Company	3,280.00

	Inventory Value
$9,500. Bond and Mortgage, Josephine Curtis and husband, covering property 139 Wood Lane, Woodmere, Long Island, past due, interest at 6% payable June and December 1st, guaranteed by Bond and Mortgage Guarantee Company	9,500.00
With respect to the above bonds and mortgages which are noted to be guaranteed by the Bond and Mortgage Guarantee Company accountant has filed proofs of claim in the proceeding for the liquidation of said company. The status of such claims is set forth in Schedule "L".	
[fol. 131]	
$2,642.61 undivided interest (of which $873.51 is a preferred interest) in $3,050. purchase money bond and mortgage, Carmine Marrone, covering 41 Montrose Avenue, Brooklyn, New York, due August 9, 1944, interest at 5% payable February 9th quarterly	2,642.61
The following premises acquired by foreclosure of mortgages thereon held by decedent at date of his death, carried at the appraised value of said mortgages at date of death.	
In these premises income also has an interest which will be determined only when said premises are sold. See Schedule Cb to Ch inclusive for status of claims allowed with respect to the guaranty of mortgages in connection with which such premises were acquired:	
Premises 46 Noll Street, Brooklyn, New York (on which there has been advanced by principal a total of $3,451.07) see Schedule Cb	3,200.00
Premises 193 Bay 17th Street, Brooklyn, New York (on which there has been advanced by principal a total of $1,536.71) see Schedule Ce	5,000.00
Premises 240 Floyd Street, Brooklyn, New York (on which there has been advanced by principal a total of *$1,247.88*) see Schedule Ch	2,700.00
Premises 1441-3 66th Street, Brooklyn, New York (on which there has been advanced by principal a total of $897.91) see Schedule Cf	4,500.00
Premises 1855 East 7th Street, Brooklyn, New York (on which there has been advanced by principal a total of $2,488.81) see Schedule Cc	5,250.00
Premises 2022 East 9th Street, Brooklyn, New York (on which there has been advanced by principal a total of $4,242.66) see Schedule Cd	6,300.00
Premises 2047 East 27th Street, Brooklyn, New York (on which there has been advanced by principal a total of *$1,914.31*) see Schedule Cg	3,187.50
	$123,229.10
Less cash overdraft	*111.10*
	$123,118.00

[fol. 132]

NOTE: In addition to the above property capital has an interest (which cannot be determined until the close of the respective current fiscal years) in the net rents on hand on July 31, 1940 in the following accounts for properties acquired by foreclosure:

	Net Rents to 7/31/40
Premises 46 Noll Street, Brooklyn, see Schedule Cb	$47.01
Premises 1855 East 7th Street, Brooklyn, see Schedule Cc	221.08
Premises 193 Bay 17th Street, Brooklyn, see Schedule Ce	169.47
Premises 1441-3 66th Street, Brooklyn, see Schedule Cf	312.17
Premises 2047 East 27th Street, Brooklyn, see Schedule Cg	44.26
Premises 240 Floyd Street, Brooklyn, see Schedule Ch	99.45
	$893.44

[fol. 133] SCHEDULE HI

$407.39 undivided interest (subject to a preferred interest of principal of $873.51) in $3,050.00 purchase money bond and mortgage, Carmine Marrone, covering 41 Montrose Avenue, Brooklyn, New York, due August 9, 1944, interest at 5% payable February 9th, quarterly	$407.39
Cash	*2,680.06*
	$3,087.45

NOTE: In addition to the above property income has an interest (which cannot be determined until the close of the respective current fiscal years) in the net rents on hand on July 31, 1940 in the following accounts for properties acquired by foreclosure:

	Net Rents to 7/31/40
Premises 46 Noll Street, Brooklyn, see Schedule Cb	$47.01
Premises 1855 East 7th Street, Brooklyn, see Schedule Cc	221.08
Premises 193 Bay 17th Street, Brooklyn, see Schedule Ce	169.47
Premises 1441-3 66th Street, Brooklyn, see Schedule Cf	312.17
Premises 2047 East 27th Street, Brooklyn, see Schedule Cg	44.26
Premises 240 Floyd Street, Brooklyn, see Schedule Ch	99.45
	$893.44

NOTE: When the above mentioned premises and 2022 East 9th Street are sold income will be entitled to a share of the proceeds, the amount of which cannot be determined until such sale.

[NOTE: Figures in italics are the adjustments made by paragraphs 8 to 14 of the decree herein.]

[Affidavit of S. R. Walker, Trust Officer of the accountant verifying account sworn to on November 18, 1940.]

[fol. 134] IN SURROGATE'S COURT,
County of New York.

REPORT OF SPECIAL GUARDIAN AND OBJECTIONS TO CONSTITUTIONALITY OF SECTION 17-c OF THE PERSONAL PROPERTY LAW AND OTHER OBJECTIONS

To the Surrogate's Court of the County of New York:

Gerald P. Culkin, as Special Guardian of William J. Demorest, Jr., an infant over the age of fourteen years, Ann Demorest, an infant over the age of fourteen years, and Carolyn Demorest, an infant under the age of fourteen years, respectfully submits the following:

That I am a counselor at law; that since my appointment as Special Guardian herein, I have to the best of my ability made myself acquainted with the rights of my wards and that I have taken all the steps necessary for the protection of such rights to the best of my knowledge and as I believe; that I have filed with the Clerk of the Court a duly acknowledged consent and an affidavit of qualification and thereafter entered upon the performance of my duties as such Special Guardian.

I have examined all the papers on file in the office of the Clerk of this court in the within proceeding.

This proceeding brought by a trustee of a decedent's estate, in addition to seeking a judicial settlement of its intermediate account, asks for instructions on several matters. At the outset I desire to request permission to file a [fol. 135] supplemental report which will deal with those items not herein considered. I believe that several of the matters discussed in this report are sufficiently unique to render advisable the confinement of this report and the consideration of the court to those matters alone.

The petition quotes paragraph "Fifth" of the Will and asks instruction from the court as to what disposition shall be made of the monthly allowance of $100 out of net income payable to the brother of testator. Said brother has died. I believe that it was the testator's intention that after the death of his brother the entire net income be paid to the widow of the testator.

The petitioner requests this court to construe the Last Will and Testament of the deceased for the purpose of

determining what proportion, if any, of the moneys or property received or which may be received by way of rents of proceeds of sale of real property acquired by the foreclosure or by deed in lieu of foreclosure of mortgages or on account of claim based upon the guarantee of such mortgages, should be apportioned either to the income or principal of the trust estate; and what part, if any, may or should be paid or applied to the use of those persons who now or hereafter may be entitled to receive or have applied to their use the income of said trust estate; and with respect to the proper method, under the construction of said will which should be employed in computing the net rents received from said properties and the apportionment thereof between principal and income.

Without extensive preliminary discussion I state these general questions involved herein:

[fol. 136] 1. Is Subsection 2 of Section 17-c of the Personal Property Law constitutional in all respects?

2. Whether Subsection 2 of Section 17-c of the Personal Property Law is or is not constitutional, partly or wholly, are certain disbursements made by the trustee and shown in the account, capital charges or carrying charges, so as to determine net income and the 3% of net income directed to be paid the income beneficiary by Section 17-c of the Personal Property Law if said section is applied?

It is my opinion that Subsection 2 of Section 17-c is unconstitutional in its entirety.

Regardless of the general objection contained in the next preceding paragraph hereof, subsection 2 of Section 17-c is unconstitutional in so far as said subsection attempts to be retroactive in its application, in so far as its application results in an allocation of income by a series of annual periods commencing with the anniversary date of acquisition of title regardless of the fact that there might not exist any true net income, to the detriment of the trust principal; and in so far as it fixes an arbitrary rate of income to the income beneficiary to the detriment of the trust principal.

Having arrived at the foregoing conclusions, I therefore find it necessary to interpose the following objection to the account.

I. I object to the following items as having been allocated to the income beneficiary by the application of Section 17-c:

[fol. 137] Schedule Cb-15—$207.61—46 Noll St. Brooklyn, N. Y.

Schedule Ce-11—$630.00—1855 East 7th St., Brooklyn, N. Y.

Schedule Ce-11—$358.67—193 Bay 17th St. Brooklyn, N. Y.

Schedule Cf-15—$527.04—1441-3 66th St., Brooklyn, N. Y.

Schedule Cg-12—$340.19—2047 East 27th St., Brooklyn, N. Y.

Schedule Ch-14—$149.43—240 Floyd St., Brooklyn, N. Y., and to Schedule AII at page 13 and Schedule III at page 1 in so far as said schedules reflect the allocation and transfer of said items to income.

II. I object to the following items of income presently in the hands of the trustees constituting income of the current fiscal year, being reserved by the trustee for allocation through the application of Section 17-c:

Schedule Cb-16—$47.01—46 Noll St., Brooklyn, N. Y.

Schedule Ce-12—$221.08—1855 East 7th St., Brooklyn, N. Y.

Schedule Ce-12—$169.47—193 Bay 17th St., Brooklyn, N. Y.

Schedule Cf-16—$312.17—1441-3 66th St., Brooklyn, N. Y.

Schedule Cg-13—$44.26—2047 East 27th St., Brooklyn, N. Y.

[fol. 138] Schedule Ch-15—$99.45—240 Floyd St., Brooklyn, N. Y., and to Schedule HI in so far as a similar notation with respect to said items is therein set forth.

The two preceding objections to such allocation and contemplated allocation are made on the ground that they are contrary to law for the reasons:

1. Subsection 2 of Section 17-c of the Personal Property Law is not properly applicable and should not be construed to be applicable to trusts created and in existence prior to April 13, 1940, the effective date of said statute.

2. Subsection 2 of Section 17-c of the Personal Property Law is not properly applicable and should not be construed to be applicable to mortgages acquired by such a trustee prior to said April 13, 1940, the effective date of said statute.

3. Subsection 2 of Section 17-c of the Personal Property Law is not properly applicable and should not be construed to be applicable to real property acquired by such trustee prior to April 13, 1940, the effective date of said statute, by the foreclosure of a mortgage theretofore held by such trustee on said real property or by deed in lieu of such foreclosure.

4. Section 17-c of the Personal Property Law is not properly applicable and should not be construed to be applicable to any income from real property which was acquired by [fol. 139] such trustee prior to April 13, 1940, the effective date of said statute.

5. Section 17-c of the Personal Property Law is not properly applicable and should not be construed to be applicable to any rents or income received from such real property prior to April 13, 1940, the effective date of said statute.

6. Section 17-c of the Personal Property Law is not properly applicable and should not be construed to be applicable to any rents or income received from such real property since or subsequent to April 13, 1940, the effective date of said statute.

To the extent that it is attempted to apply said Section 17-c to any of the foregoing subjects set forth in sub-paragraphs 1 to 6 and to the properties received by the accountant, said statute is invalid and unconstitutional and its provisions arbitrary and said statute deprives my wards as residuary remaindermen of the trust estate of property without due process of law and in a manner prohibitive by and contrary to the provisions of Section 6, Article I of the Constitution of the State of New York and to the provisions of the 14th Amendment to the Constitution of the United States of America.

It is my contention and I therefore respectfully submit to the court that the sums hereinbefore referred to should be and are properly applicable and should therefore be used in reduction of the amounts advanced from the principal of the trust estate in accordance with the equitable rules established by the decisions of the courts of this State prior to [fol. 140] the enactment of Section 17-c of the Personal Property Law, and certainly to the repayment to principal of advances made out of principal for expenditures properly chargeable against income.

III. I object to the allocation to income of the sums hereinbefore mentioned to the extent that said sums exceed net profit, if any, derived from the operation of the respective real properties from the date of the acquisition thereof to the close of the last complete fiscal year of the operation of said properties, that is to say, I specifically object to

Schedule	Property	Gross rents to said date	Carrying charges to said date	Net Profit	Sum allocated to income per account	Excess of sum allocated over net profit if any
Cb	46 Noll St., Brooklyn, N. Y.	$2,555.00	$2,848.12	*$293.13	$207.61	$207.61
Cc	1855 E. 7th St., Brooklyn, N. Y.	2,392.91	2,185.52	207.39	630.00	422.61
Ce	193 Bay 17th, Brooklyn, N. Y.	1,606.83	1,269.68	337.15	358.67	21.52
Ch	240 Floyd St., Brooklyn, N. Y.	2,030.54	1,882.18	148.36	149.43	1.07

* Deficit

The last mentioned objection numbered "III" is made on the ground that, to the extent the sums so allocated to income, exceed the net profits from the operation of the respective properties during such period such allocation is contrary to law, in that said sums do not constitute the net income within the purview, meaning and intent of subdivision 2 of said Section 17-c of the Personal Property Law and it is my contention that said sums should be used to [fol. 141] the extent of such excess in reduction of the amounts advanced from principal in connection with the operation of the respective premises; and I object to the statement contained in Schedule Cb of said Account at page 16 and to a similar statement in Schedule H 1 to the effect that a part of the sum of $47.01 hereinbefore mentioned of rents from 46 Noll Street, Brooklyn, New York, received during the current fiscal year may constitute income and

this objection is based on the ground that such a statement and the action contemplated thereby are erroneous in and contrary to law; that all of said sum will necessarily be required to repay principal advances for deficits resulting from the operation of said property prior to the commencement of said current fiscal year and no part of said sum of $47.01 can constitute net income.

IV. I object to the statement of apportionment between principal and income of the proceeds of sale of premises 168 Morrison Avenue, West New Brighton, Staten Island, New York (Schedule Ci, pages 8 and 9) in that the accountant improperly computes the interest of income in said proceeds of sale at the rate of 6% per annum from June 1, 1934, the date to which interest was paid, to August 25, 1938, the date of sale. The mortgage foreclosed was a guaranteed mortgage. Although the interest rate reserved in the mortgage was 6%, the guarantee provides for the payment of ½% to the guarantor corporation for servicing the said mortgage and the purchaser of said guaranteed mortgage did not anticipate or expect to receive as income from said [fol. 142] mortgage any rate of interest above 5½%. To apply this objection specifically to the account, I object to the item in Schedule AII at page 12 under date August 25, 1938 which fixes the share of the proceeds of sale properly allocated to income per schedule Ci at $714.44 and to the item of Schedule III, in so far as the amount shown therein to be income consists of cash incorrectly allocated to income, pursuant to the aforesaid improper computation. This objection is made on the ground that said apportionment is erroneous and that as hereinbefore stated, the interest of the income account in said proceeds of sale should be computed at the rate of 5½% per annum from June 1, 1934 to August 25, 1938, which was the interest rate actually received by and anticipated by the purchaser of the guaranteed mortgage, in which event the computation would be as follows:

Face amount of foreclosed mortgage	$5,000.00
Interest thereon at 5½% from June 1, 1934 (date to which interest was paid) to August 25, 1938 (date of sale)	1,164.17
	$6,164.17

Principal is entitled to 500000/616417ths of $3,527.22, or	$2,861.07
Income is entitled to 116417/616417ths of $3,527.22, or	666.15
	$3,527.22

In any event, should the court deem my suggested allocation at 5½% not to be properly applicable to the entire period from June 1, 1934 to August 25, 1938, the interest of the income account in said proceeds of sale should be com- [fol. 143] puted at said 5½% per annum, at least from June 1, 1934 to October 16, 1934 when, as shown by the account, the agency of the guarantor corporation was terminated and at 6% thereafter to August 25, 1938, the date of sale. In the event this method of computation is applied the figures would be as follows:

Face amount of foreclosed mortgage	$5,000.00	
Interest thereon at 5½% from June 1, 1934 (date to which interest was paid) to October 16, 1934 (date when agency of guaranty company was terminated) and at 6% from October 17, 1934 to August 25, 1938 (date of sale)	$1,260.62	
	$6,260.62	
Principal is entitled to 500000/626062nds of $3,527.22, or		$2,816.99
Income is entitled to 126062/626062nds of $3,527.22, or		710.23
		$3,527.22

V. I make the same objection to the apportionment between principal and income of the sum realized upon the sale of premises 41 Montrose Avenue, Brooklyn, New York, substituting the applicable date to which interest was last paid, the date of acquisition and the date of sale effecting premises 41 Montrose Avenue, Brooklyn, New York. Applying said objection specifically to the account, I object to the following item in Schedule AII at page 12, which reads as follows:

Premises 41 Montrose Avenue, Brooklyn, New York (acquired by foreclosure; see Schedule Cj)

[fol. 144] Aug. 9, 1939 Share of proceeds of sale allocated to income, consisting of $407.39 undivided interest (subject to a preferred interest of principal of $1,023.51) in $3,200.00 purchase money mortgage, Carmine Marrone, covering said premises, due August 9, 1944, interest at 5% payable February 9th quarterly, see Schedule Cj $407.39

and to the reflected item in Schedule HI to the extent that the interest in the purchase money mortgage therein referred to and shown as income consists in such interest in said mortgage incorrectly allocated to income pursuant to the foregoing computation, which I maintain is improper. This objection is on the ground that such apportionment is erroneous, that the interest allocated to income in said proceeds of sale should be computed at the rate of 5½% per annum from July 1, 1935 to August 9, 1939, in which event the computation would be as follows:

Face amount of foreclosed mortgage	$4,750.00	
Interest thereon at 5½% from July 1, 1935 to August 9, 1939 (date of sale)	$1,072.74	
Less interest paid on account	76.24	996.50
		$5,746.50
Principal is entitled to 475000/574650ths of $2,176.49, interest in purchase money mortgage subject to prior interest, or		$1,799.07
Income is entitled to 99650/574650ths of $2,176.49, interest in purchase money mortgage subject to prior interest, or		377.42
		$2,176.49

[fol. 145] In passing and for the reason that hereafter it may become important with respect to other properties which may be foreclosed by the trustee or taken in lieu of foreclosure, I call attention to the morgage affecting premises 240 Floyd Street, Brooklyn, N. Y. and referred to in Schedule CH-1 et seq. The court will note (Schedule Ch at page 1) the trustee agreed by letter to the owner of

the mortgaged premises, that the interest rate be reduced to 4%. Accordingly this was the interest rate when the property was foreclosed and this is the rate which should be used in estimating income's claim preliminary to allocation. It would prove helpful if the Surrogate were to instruct on this matter also.

VI. I object to the charge as capital improvements in said account of items of expense more specifically set forth in Schedule A hereto annexed and made a part hereof. This objection is predicated on the following grounds:

1. That said expenditures do not constitute capital expenses and were not made for capital improvements and that neither under the provisions of Section 17-c of the Personal Property Law, nor under the law as it existed prior to the enactment of said section and regardless of the constitutionality or effectiveness of said section, the items of expenditure do not constitute capital charges.

2. Said expenditures are ordinary expenses connected with the continuance of the property in substantially its ex- [fol. 146] isting state and are payable from income. They are properly chargeable and should be charged against rents received from the respective premises and should be considered and deducted from gross income in arriving at the net income of the respective premises.

VII. Applying the objection numbered "VI" to the income presently in the hands of the accountant and derived during the current fiscal year, I object to the statements contained in the account that the rents received during the current fiscal years can or might be allocable to income at the end of the respective fiscal years of said properties to the extent that said sums consist of rents which would be necessary to restore principal for the advances made in connection with the items contained in Schedule A hereto annexed because, as set forth in objection "VI", said items accruing during the said fiscal years would be improperly charged to capital and as capital improvements and are properly chargeable to and should be deducted from gross rents of the respective properties in determining the net income of said properties.

As to the disposition of any sums which may hereafter be received by the trustee on general claims allowed by the

Superintendent of Insurance as Liquidator of the Guarantor companies I respectfully report as follows:

According to the information received by me through activities of my office in similar matters, the likelihood of distribution on general claims is very remote. The amounts of such claims are determined as the difference between the value of the security and the debt due on the guaranty as of the effective date of the order of liquidation. If any sums [fol. 147] are received on these claims they should be apportioned between principal and interest as they appeared on the effective date of the order of liquidation.

I need not go into a lengthy discussion of the law of allocation of income and proceeds of sale as determined by the cases antedating enactment of Section 17-c. I believe all parties concerned in this proceeding and the Court will concede that said section is designed to change, or modify, the law as fixed and applied in those cases.

Getting down to the case at bar—if this proceeding had been concluded in March, 1940 the decree would have undoubtedly followed the law as stated in *Matter of Chapal*, 269 N. Y. 464 and in *Matter of Otis*, 276 N. Y. 101 and cases therein cited with approval. Presumably in March, 1940 the residuary remainder would have had adjudged to it certain property rights which, because this proceeding was instituted after April, 1940, are not property rights if Section 17-c, subsection 2, is applied retroactively. Why should the rights of a person in the application of income during the years 1938, 1937, 1936, 1935 fixed by decree dated March, 1940 differ from rights of similarly situated persons for the same period because the rights in the latter instance are adjudicated by decree dated May, 1940 or later? The application of Section 17-c to the property rights of the remaindermen prior to the enactment of the Statute amounts to a deprivation of property without due process of law.

The Statute presumes to legislate intent. It is not reasonable to presume that a testator intended to prefer the life [fol. 148] beneficiary in every instance over the remainderman. Let us suppose testator had devised the property in fee to the widow, could we also presume that he expected or intended application of the general estate to the support of the property when it was in trouble? In fact, were testator alive would he not consider disbursements out of his reserve funds ordinarily deducted from gross income as prop-

erly payable back to reserve before he considered any income as being real income and regardless of yearly income and disbursements? It should not be argued that the only effect of subsection 2 of Section 17-c is to postpone the repayment to principal until the sale. There can be no assurance that the property will bring enough on the sale to produce an equitable result. There might be sound argument for the Statute if the real net income were progressively allocated between principal and income in proportion as on a sale but there is no justification of the arbitrary preference of 3% of the mortgage principal to the income beneficiary in advance.

The will sets up the status of principal and income. These two accounts, although "fictions" (*Matter of Otis, supra*) are nevertheless two separate accounts in so far as their beneficiaries are concerned and when money ordinarily paid from income is loaned out of principal, that amount at least should be repaid to principal before any legislation can properly direct distribution to income. This seems to be the law.

Matter of Chapal and *Matter of Otis, supra,* fix an equitable distribution on a sale as between principal and income. Section 17-c has for its purpose a consideration of the life tenant regardless of the consequences to the principal of [fols. 149-155] the trust and without requiring that income first pay its debts to principal.

Assuming the right of the legislature to provide by statute for distribution to income beneficiaries during salvage operations, this distribution should be limited to the proportionate share of real net income after income obligations to principal have been repaid. The advances from principal for capital disbursements might be added to the principal account as an increase in capital investment and await sale for repayment but there is no justification for defeating the testamentary set-up by invasion of principal for the continuance of income.

In *Matter of Otis, supra,* the Court of Appeals, in defining an equitable doctrine, quotes with approval the opinion of Cullen, J., in *Matter of Rogers*, 22 App. Div. 428, 436. Referring to the opinion of CULLEN, J., in *Matter of Rogers*. I quote, as follows, from page 436:

> "Why should each not have exactly his own so far as it is possible to ascertain it?"

This would appear to be equitable. But allocation of 3% of net income regardless of other considerations as provided by Section 17-c, subsection 2, is not giving to each what is its own.

Section 17-c, subsection 2, of Personal Property Law is unconstitutional.

Dated, New York, N. Y., January 16, 1941.

Respectively submitted Gerald P. Culkin, *Special Guardian.*

(Verified by Gerald P. Culkin, January 16, 1941.)

[fol. 156] In Surrogate's Court, County of New York

Objections

Emma M. West, by her attorneys, Larkin, Rathbone & Perry, does hereby make and file the following objections to the account of City Bank Farmers Trust Company, as Trustee of the trusts created under the last will and testament of Henry C. West, deceased:

1. To the item of $575. paid to Curtis R. Larkin on August 9, 1939, as shown by Schedule Cc, page 8, being a capital improvement, namely, for decorating, carpentry, plumbing, etc.

2. To the item of $13.50, dated May 4, 1939, as shown by Schedule Cf, page 11, being the cost of a capital improvement, namely, a gas range.

3. To the item of $604.07 shown by Schedule Ci-9, for reimbursement to principal of foreclosure expenses, consisting of taxes, water charges and penalties, due at the time of acquisition of the property 168 Morrison Avenue by the Trustee.

4. To the failure to allocate 3% of the net rents derived from the operation of premises 168 Morrison Avenue during the fiscal year ending March 4, 1938, namely, $232.30, as shown by Schedule Ci-7, or of 3% of the net rents derived from the operation of said property for the period ending August 25, 1938 of $107.87, as shown by Schedule Ci-8, to income.

[fol. 157] 5. To the failure to allot interest at the prevailing rate, for the period within which, from the time of

their receipt, said net rents were withheld from distribution to this objectant as life beneficiary.

6. To the items in Schedule Ci-9 showing the allocation as between principal and income of the cash on hand, which allots to income the inadequate sum of $714.44.

7. To the item of $714.44 in Schedule AII-12, under date of August 25, 1938, being the share of the proceeds of sale allocated to income, on the ground that the amount thereof is inadequate.

8. To the failure in Schedule Cj-13 to allocate to income net rents derived from the operation of property 41 Montrose Avenue, up to 3%, of the item of $164.16 received for the period ending December 22, 1938, and the like proportionate share of the item of $157.34 for the period ending August 9, 1939.

9. To the failure to allot interest at the prevailing rate upon said items during the period within which they were withheld from payment to this objectant as life beneficiary.

10. To the failure in Schedule AII-12 to allot to income the sum of $118.82 received on the purchase money mortgage on 41 Montrose Avenue after resale, with interest during the period within which the items were withheld from payment.

11. To the allocation to income in Schedule Cj-14 of the inadequate amount of $407.39, as its share in the purchase money mortgage received upon the resale of the property, [fol. 158] and to the failure to allot to income any portion of the cash received upon such resale.

12. To so much of Schedule AI-5 as fails to allot to income any portion of the amortization payments received from said purchase money mortgage on premises 41 Montrose Avenue.

13. To the items of $407.39 allocated to income by Schedule AII-12 in said purchase money mortgage under date of August 9, 1939, and its subjection to the preference accorded to principal of a preferred interest in said purchase money mortgage in the amount of $1,023.51.

14. To the item of net rents, aggregating $749.73, shown by Schedule HI-1, on the ground that said rents, having

been received after the date of enactment of Section 17-c of the Personal Property Law, are payable and should be allocated to this objectant as life beneficiary up to 3% of the face amount of the mortgage in each case.

15. To the item contained in said Schedule HI of cash amounting to $2,724.66, representing balance of income on hand, which should be paid to this objectant as life beneficiary.

Larkin, Rathbone & Perry, *Attorneys for Objectant, Emma M. West,* Office and Post Office Address, No. 70 Broadway, Borough of Manhattan, City of New York.

(Verified by Emma M. West, January 13, 1941).

[fols. 159-192] In Surrogate's Court, County of New York

Before Honorable James A. Foley, Surrogate

New York, New York,
January 16, 1941.

Appearances:

Messrs. Mitchell, Taylor, Capron & Marsh, Attorneys for Petitioner, City Bank Farmers Trust Company, 20 Exchange Place, New York, New York. C. Alexander Capron, Esq. and James K. Taylor, Esq., Of Counsel.

Messrs. Larkin, Rathbone & Perry, Attorneys for Respondent, Emma M. West, 70 Broadway, New York, New York. Albert Stickney, Esq., Of Counsel.

Messrs. Butler, Wyckoff & Reid, Attorneys for Respondents, Marie Elizabeth West Jones and Elizabeth Frances Jones, 20 Exchange Place, New York, New York. James Morrow, Esq. and also James L. Hanford, Esq., of the New Jersey Bar, Of Counsel.

Gerald P. Culkin, Esq., Special Guardian for Infant Respondents, William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, 31 Nassau Street, New York, New York.

. . . . . .

[fol. 193] Will of Henry C. West

I, Henry C. West, of the City, County and State of New York, do make, publish and declare this to be my Last Will and Testament, hereby revoking any and all other wills by me at any time made.

First. I direct my just debts and funeral expenses to be paid as soon as may be after my decease.

Second. I direct that all transfer, inheritance, estate or succession taxes and death duties be paid out of my general estate as an expense of the administration thereof.

Third. I give and bequeath the sum of Two thousand five hundred dollars ($2,500) to the Trustees for the corporation of Greenwood Cemetery of New York, and its and their successors, in trust, to invest and keep the same invested, and to apply the income therefrom to the proper care of the burial plot in said Cemetery known as the West-Emery, lot number 2322.

Fourth. I give and bequeath to Emma M. West, my wife, the sum of Twenty-five thousand dollars ($25,000) to be paid to her as immediately after my death as is possible.

Fifth. All the rest, residue and remainder of my estate, both real and personal, wheresoever situate, of which I may die seized or possessed, or to which I may be entitled at the time of my death, I give, devise and bequeath to The Farmers' Loan and Trust Company, a corporation organized and existing under the laws of the State of New York, in Trust, nevertheless, for the following uses and purposes: To lease said real property and collect the rents thereof, and to [fol. 194] invest and from time to time in its discretion reinvest the personal property in such securities as to it may seem proper; to collect the rents, issues and profits of all of my said residuary estate, and, after paying all necessary charges of administration, to apply the net income from said estate to the use of my wife, Emma M. West, during the term of her natural life, or until she shall remarry; provided, however, that during the life of my said wife, Emma M. West, but not after her death, there shall be first applied out of the said net income the sum of One hundred dollars ($100) per month to the use of my brother, Zimri West. If

my said wife shall remarry, the aforesaid payment to my said brother shall continue to be made as long as my said wife lives.

Upon the death or remarriage of my said wife, my Trustee shall set aside from my residuary estate cash or securities having a then value of Thirty thousand dollars ($30,000) and shall continue to hold and administer the same, in trust, and shall pay or apply the net income therefrom to the use of my nephew, Zimri West, 3rd, during the term of his life, and upon his death shall transfer and pay over the principal of such trust fund to my grandniece, Elizabeth Frances Jones, if she is then living, or, if she shall then be dead, shall transfer and pay over the same in equal shares per stirpes to and among her issue then living. The balance of my said residuary estate my Trustee shall continue to hold and administer, in trust, to pay or apply the net income therefrom to or for the use of my niece Marie Elizabeth West Jones, during the term of her life and upon her death shall transfer and pay over one-third of the principal of such trust fund to her daughter, my grandniece, Elizabeth Frances Jones, or, if she shall then be dead, to her issue [fol. 195] then living in equal shares per stirpes, and shall transfer and pay over the remaining two-thirds of such trust fund in equal shares per stirpes to the issue then living of my wife's niece, Wealthy Albro Lewis Demorest. If, pursuant to the foregoing provisions of this my Will, any part of my estate shall have been held in trust for a period of two lives and shall not therefore by law be eligible to be continued in trust for an additional period as directed by this Will, such part of my residuary estate shall, at the expiration of a period of two lives during which it has been held in trust, be transferred and paid over by my Trustee outright, free and discharged of any trust, to the persons otherwise entitled pursuant to the provisions of this Will to receive the income therefrom. If at any time pursuant to the provisions of this my Will any part of my property shall not have been effectually devised or bequeathed, I hereby give, devise and bequeath the same at such time to the then living issue of my wife's niece, Wealthy Albro Lewis Demorest.

Sixth. I authorize my Trustee to retain, so long as to it may seem proper, any securities left by me at the time of my decease, and also to sell the same, and, from time to time,

in its discretion, to invest and reinvest the proceeds thereof, and also any other cash at any time in its hands as Trustee, in such securities as to it may seem wise, it being my intention that in the making of new investments my said Trustee shall not be limited to the class of securities in which trustees are authorized by law to invest trust funds. My Trustee shall not be liable, or responsible for any loss resulting from the making or retention of any investment made or retained by it, in good faith.

No sinking fund shall be set aside from the income of any securities which may at any time form a part of the trust [fol. 196] funds to guard against the diminution of the premium on such securities.

Any and all stock dividends upon stocks of corporations forming part of the trust fund, payable in the stock of the corporation declaring or authorizing the same, which may be received by the Trustee at any time shall be treated and considered for all purposes as a part of the capital of the trust funds; but all extraordinary dividends or distributions other than stock dividends whether paid in bonds, cash or otherwise shall be treated as income.

Said Trustee, in its discretion, is authorized to deposit any of the securities at any time forming part of any trust estate under any plan or plans of reorganization, merger or consolidation that may commend themselves to its good judgment, and to accept the new securities which may be offered to it under any such plan or plans in exchange for such original securities, and to pay any and all assessments levied or imposed under such plan or plans of reorganization, and to charge the amount thereof against the principal of the trust estate.

I give to my Trustee full and absolute power to sell, lease, mortgage, exchange, partition or otherwise deal with any real property or interest therein of which I might die seized in like manner as I might or could do if living, and to execute all proper deeds, mortgages, leases and other instruments affecting or appertaining to said real property.

Seventh. The provisions of this Will for my wife are intended to be and shall be accepted by her in lieu of dower and all other claims in my estate.

Eighth. I nominate, constitute and appoint The Farmers' Loan and Trust Company, a corporation organized [fols. 197-201] and existing under the laws of the State of

New York, having its principal place of business at Number Twenty-two William Street, in the Borough of Manhattan, City, County and State of New York, to be the Executor of and Trustee under this my Last Will and Testament, and I direct that no bond or other security shall be required of it for the faithful performance of its duties in either capacity.

In Witness Whereof, I have hereunto set my hand and seal this 14th day of December in the year One Thousand nine hundred and twenty-eight.

Henry C. West. (Seal.)

Witnesses: Ronald Mac Lean, H. Vincent Smart, James D. Ouchterloney.

The Foregoing Instrument was signed, sealed, published and declared by the above named Testator, Henry C. West, as and for his Last Will and Testament, in the presence of us, who, in his presence, at his request and in the presence of each other, have hereunto subscribed our names as witnesses the day and year last above written, this attestation clause having first been read aloud.

Name Ronald Mac Lean. Residing at 1325 Foster Av. B'kyn, NYC.

Name H. Vincent Smart. Residing at 151 Bronxville Road, Bronxville, N. Y.

Name James D. Ouchterloney. Residing at 197-01 110th Ave., Hollis, N. Y.

[fol. 202] In Surrogate's Court, County of New York

Opinion of Surrogate

(Dated March 8, 1941)

175 Misc. Rep. 1044

Foley, S.:

In this accounting proceeding the answers of certain of the parties and the report of the special guardian have raised numerous issues involving salvage operations of mortgaged properties acquired by a trustee by foreclosure or by deed in lieu of foreclosure. Such issues involve in part questions as to the effect of the decisions of the Court of

Appeals in *Matter of Chapal* (269 N. Y. 464) and *Matter of Otis* (276 id. 101), and in part the effect of the recently enacted Section 17-c of the Personal Property Law, which modified in certain phases the former rules in salvage operations. The briefs of the various attorneys have analyzed these questions with commendable thoroughness.

Under the terms of the testator's will, the residuary estate was devised and bequeathed in trust, "to apply the net income from said estate to the use of my wife, Emma M. West, during the term of her natural life, or until she shall remarry." Upon the death of the testator's widow, the estate was directed to be continued to be held in trust upon certain shares for the benefit of a nephew and a niece of the testator, with contingent remainders. The trust is still in effect.

At the date of his death the testator owned a number of entire guaranteed mortgages. Title to nine of the properties, upon which the mortgages were liens, was acquired by the executor either by foreclosure sale or by deed in lieu of foreclosure. By the decree of this court, dated August 10, 1936, upon an accounting by the executor, the properties so acquired were directed to be transferred by the executor to itself as trustee, as assets of the trust, to be held in sepa- [fol. 203] rate account by the trustee. Questions as to the apportionment of the proceeds received upon the ultimate sale of the properties and the respective rights of principal and income beneficiaries in them were reserved for determination by decree in a subsequent accounting proceeding of the trustee. The trustee has now accounted for the operation of each of these properties. The account discloses that as to seven of the properties the salvage operations are still unfinished. The operation of the other two properties is complete, since they were resold prior to the enactment of Section 17-c of the Personal Property Law—one for cash and the other for part cash and part by the execution and delivery of a purchase-money mortgage. No distribution, however, has been made of the proceeds of sale of either of these properties.

The issues raised may be summarized as follows:

First. The constitutionality of subdivision 2 of Section 17-c of the Personal Property Law (added by Laws of 1940, Chap. 452, effective April 13, 1940) which modified, in certain respects, the prior rules in mortgage salvage operations.

Second. If constitutionality be sustained, the effect of the terms of that subdivision upon salvage operations falling within its scope.

Third. The determination of new questions not arising under Section 17-c of the Personal Property Law and not decided specifically by the Court of Appeals in *Matter of Chapal* (*supra*) and *Matter of Otis* (*supra*) or by other authorities dealing with mortgage salvage operations.

First. In the consideration of the constitutionality of new Section 17-c of the Personal Property Law, the prior deci- [fol. 204] sions of the Court of Appeals, the existing situation in trusts, the reasons and conditions which led to its enactment and the terms of the section itself become important. The *Chapal-Otis* rules had, to a great extent, simplified the problem of the trustee, the lawyer and the courts of first instance, in dealing with particular situations developed before them. But complications still remained in salvage operations.

As the economic depression subsequent to 1929 deepened and the value of real properties melted, a wave of foreclosures resulted. Mortgages, which had been regarded in former years as attractive and desirable investments for trust funds, created after foreclosure or acquisition of title complicated and difficult questions with the imposition of burdensome expense to persons interested in trust estates. The complications involved in the computation in a pending or completed salvage operation are emphasized in the pending proceeding where the mathematical analyses and the supporting schedules cover fifty-one closely typed pages of the account. The solution of these problems became the subject of study by members of the Bar and particularly by those who were specialists in the law of trusts and estates. In liaison with the Executive Committee of the Surrogates' Association of our State, intensive investigation was made with the objective of simplification of the rules applying to mortgage salvage operations. Two solutions were immediately presented. The first involved a repeal of the *Chapal-Otis* rules in their entirety, with a recommendation to the Legislature to enact a statute which would treat the foreclosed or acquired real property as a capital asset in the same manner as ordinary real estate left by a testator. [fol. 205] If the foreclosed real estate was thus treated as a capital asset, net income derived from the property would

become immediately payable to the life tenant. Upon a sale of the realty, the proceeds would be treated as part of principal. Upon such sale, no allocation between life tenant and remainderman was required. Such was the form of the statutory relief passed by the Legislature of Connecticut. (Pub. Acts [1939], chap. 232.)* The obstacle to the recommendation of the passage of such a sweeping statute, despite the common sense approach which motivated it, was the belief by some of the conferees that if it were applied to mortgage investments made before the effective date of the new statute, it might be subject to the hazards of a determination of unconstitutionality. The second alternative of those who drafted and recommended the passage of the statute by the Legislature was to divide the problem into two parts. The division provided, first, for the abolition of salvage operations as to future investments in mortgages and second, with the major objective of assisting life tenants, for the modification, within constitutional limits, of the existing law as to investments in mortgages made prior to the effective date of the statutory amendment. That program was ultimately adopted and is embodied in new Section 17-c of the Personal Property Law.

Its first subdivision abolished the *Chapal-Otis* rules as to testamentary trusts of persons dying after the effective date of the statute and as to *inter vivos* trusts thereafter established. It likewise was made to apply to mortgage investments made after such effective date in existing trusts, whether testamentary or *inter vivos*. As to such trusts and mortgaged real property the new subdivision stated that [fol. 206] the "real property shall be and become a principal asset in lieu of" the mortgage. The "tenant or tenants for life or limited term shall be entitled to the net income from such acquired real property from the date of its acquisition." The rules of procedure under the *Chapal-Otis* decisions were "abolished." Any allocation or apportionment between life tenant and remainderman was prohibited. In the pending proceeding no question has arisen as to the constitutionality of such first subdivision. Indeed, no such question would be tenable since its provisions were wholly prospective in operation.

We now come to the consideration of the terms of the second subdivision of the section, the constitutionality of

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* Supplement to General Statutes (1939), § 1291e.

which is in dispute here. Two relatively simple modifications of the *Chapal-Otis* rules were made in this subdivision. Under those rules and particularly under the language of the opinion of Judge LOUGHRAN in *Matter of Otis* (*supra*), a discretionary power was given to a trustee during a mortgage salvage operation to disburse income to the life tenant, after advances made from principal as an incident to the acquisition of the property had been repaid. It was found, however, that trustees hesitated to make any payment to the life tenant or to exercise the judicial discretion given to them by *Matter of Otis*, because of the fear of a possible surcharge in the event of an overpayment to the life tenant. The life tenant in almost every instance was the primary object of the testator's bounty. The beneficiary intended to be most favored was thus deprived, by the trustee's inaction or hesitancy, of receiving income during the entire salvage period and large sums of money were accumulated and frozen. The injustice to the life tenant was aggra- [fol. 207] vated by the fact that because of the lack of a ready market for the resale of the property, the salvage operation was unduly extended for a long period of years. This situation is emphasized by the facts revealed in the present proceeding. Of the seven mortgages now involved in the salvage operations in which no resale has taken place, the longest period of operation has been six years and two months. The shortest period has been four years and ten months. Thus the average period of operation of all seven mortgages has been approximately five years. In the two completed operations the periods of salvage were two years and six months and two years and eight months. This unhappy situation has been corrected by the new legislation. Trustees are expressly authorized to pay promptly net income derived from the foreclosed or acquired property up to three per centum per annum upon the face amount of the mortgage. From the time of the passage of the new act, it has been the practical experience and observation of the Surrogates that hundreds of thousands of dollars which had been theretofore accumulated, were paid out to life tenants upon the authority granted by the statute. Where the trustee had paid the yearly income up to the three per cent maximum to the life tenant, the statute made the payment final. It was specifically stated by the Legislature that such payment up to the maximum was "not subject to

recoupment from the life tenant or as a surcharge against the trustee or executor." Moreover, under the new statutory rule, net income up to the maximum of three per cent became payable from the very beginning of the salvage operation, that is, from the date of acquisition by foreclosure or by deed in lieu of foreclosure.

[fol. 208] The other amendment to the *Chapal-Otis* rules made by the second subdivision of the new section in the balancing of the equities, furnished protection to the remaindermen interested in the principal of the trust. Excess net income earned in any one year during the salvage operation above the three per cent maximum payable to the life tenant, was directed to be applied to advancements from principal for arrears of taxes and other liens which accrued prior to the foreclosure or acquisition in lieu of foreclosure and to the cost of capital improvements. Where any balance of unpaid principal advances remained due at the close of the salvage operation, such balance was declared to be "a primary lien upon the proceeds of sale and shall be paid first out of any cash so derived. If insufficient the balance shall be a primary lien upon any purchase money mortgage received upon the sale."

The special guardian of the infant remaindermen has, perhaps, by way of formal objection with a view to a review of this decision by the appellate courts, raised the issue of unconstitutionality. By that procedure it is hoped by all those interested in this program of law reform, that the constitutionality of the new statute will be forever quieted. In essence, therefore, this proceeding is to be regarded as a test case. The special guardian contends that the new statute deprives his wards of property rights and that it is violative of the due process clause of the Fourteenth Amendment of the Federal Constitution and of the similar clause contained in our State Constitution.

His specific attack is based upon the retroactive provisions of the new second subdivision which apply to mortgage investments made previous to its enactment or to sal-
[fol. 209] vage operations initiated prior to such enactment. It provides: "The terms and rules of procedure of this subdivision shall apply specifically (a) to the estate of persons dying before its enactment and (b) to mortgages on real property held by a trustee under a deed of trust or other instrument executed before the date of its enactment and (c) to real property acquired by foreclosure of mort-

gage or real property acquired in lieu of foreclosure before or after the date of its enactment in trusts created or mortgage investments made prior thereto, and (d) to any pending proceeding or action for an accounting of the transactions of an executor or trustee." It is claimed that the effect of that subdivision was to take away property from the remainderman in so far as the amounts paid to the life tenant up to the maximum of three per cent per annum might exceed the income allocable to him under the *Chapal-Otis* rules at the close of the mortgage salvage operations.

All of these contentions are overruled. The provisions of the new subdivision are merely remedial, procedural and administrative. The Legislature has done no more in formulating a modification of existing rules than the courts themselves could do and have done within their constitutional powers. In a general sense the rules as to these salvage operations have been in a fluid state and have never been absolutely or finally fixed by the courts in their application to existing trusts or prior salvage operations. The strongest support for that conclusion is found in the opinion of Judge Loughran in *Matter of Otis* (*supra*). He there stated, "Perhaps it should be added that a general rule for such situations cannot be attained at a bound, that no rule [fol. 210] can be final for all cases and that any rule must in the end be shaped by considerations of business policy. Accordingly, we have here put aside inadequate legal analogies in the endeavor to express fair, convenient, practical guides that will be largely automatic in their application. Only the sure result of time will tell how far we have succeeded." (*Matter of Otis, supra*, p. 115.) The "sure result of time" had led the Legislature to make the changes of procedure upon the ground of necessity and advisability by the enactment of the new subdivision. The traditional tests of a statute are the old law, the mischief and the remedy. It is the duty of the courts so to construe the act as to suppress the mischief and advance the remedy. The legislative purpose was declared in the statute itself in subparagraph (d) of subdivision 2 of the section. It reads: "The purpose of the enactment of this subdivision is declared to be the simplification of the rules of procedure in mortgage salvage operations and the elimination of present complications which work to the disadvantage of the life tenant, who is usually the principal object of the testator's

or settlor's bounty, by depriving him of a fixed right to the actual payment of any net income earned by the property. Such fixed right is granted in lieu of the discretion now given to the trustee to pay net income or any part thereof to the life tenant. The general rules of the apportionment of the proceeds of sales between life tenant and remainderman are retained subject to the express modifications made herein. Only equitable adjustments and balances as between the parties are intended to be effectuated by the provisions of this subdivision."

[fol. 211] The additional reasons which moved the Legislature to modify the existing rules under the *Chapal-Otis* decisions are stated in the explanatory note which was printed in the legislative bill. It is indicative of the intent of the Legislature. It reads in part: "The *Chapal-Otis* rule authorizes the trustee to pay surplus net income in his discretion. Trustees have hesitated to pay such net income because in the case of overpayment to the life tenant, the trustee might be surcharged with that amount. The life tenant of the trust must wait in the majority of cases for a long period of time before he becomes entitled to the payment of any income, because of the present requirement that advances from principal for the expenses of foreclosure and for arrears of taxes and other liens must first be paid from the net income of the property. The amendment provides for the immediate payment of income to the life tenant beginning with the date of the acquisition of the property by the trustee by foreclosure or conveyance in lieu of foreclosure."

Again, the nature of a salvage operation was described in *Matter of Otis* (*supra*); as a resort to fictions. "Both capital account and income account, as described in the *Chapal* case, are fictions. * * * If, then, the remaindermen are to participate in the apportionment on the feigned basis of unimpaired principal, the share of the life tenant should be computed on the same assumption. The invention of the 'original investment' is no more valid than the invention of 'unpaid interest' thereon. Indulgence in both fictions keeps the balance even between the respective parties in interest." Under the "historic fictions" of the Eng-[fol. 212] lish law and the modern fictions which exist under our own law, their ineptness have led to change and improvement by the courts which had to apply them. This

very ineptness also constituted an invitation to Parliament in England, and to our own Congress and Legislatures, to alter the fictions, particularly in procedural matters, in order to correct injustice. Fictions, as stated by Professor Gray, were invented and altered "in order that the wine of new law might be put into the bottles of old procedure." (Gray, The Nature and Sources of the Law, p. 34.) The fiction was always capable of modification to meet the needs of modern justice.

Alterations of rules of procedure or administration made by the Legislature or by the courts, do not change substantive rights. Rules of procedure may, therefore, be modified, added to or repealed as the exigencies of the law and particular situations require. "Nor has a person a vested interest in any rule of law entitling him to have the rule remain unaltered." (*Preston Co.* v. *Funkhouser*, 261 N. Y. 140; affd., *sub nom. Funkhouser* v. *J. B. Preston Co.*, 290 U. S. 163, citing *Truax* v. *Corrigan*, 257 id. 312, 348.)

It is claimed that the effect of subdivision 2 of Section 17-c was to take away property from the remainderman, in so far as the amount ultimately payable to him on a sale of the real property might be less than the amount which would be payable to him under the rules laid down in *Matters of Chapal* (*supra*) and *Matter of Otis* (*supra*). The possibility that such a situation might result is infinitesimal. Two factors show the extreme improbability of the occurrence of such an event. The customary mortgage interest rate for several years past has been five per cent per annum. [fol. 213] The maximum amount payable to the life tenant, under the new statute, is three per cent. There is, therefore, a margin of safety of two per cent available in the average case in the final computation of allocation to income. Again, a property which would yield three per cent net per annum would, in all probability, produce a selling price sufficient to pay the life tenant, after final apportionment, a sum in excess of what had been paid within the statutory maximum during the period of the salvage operation.

Many remedial rules of procedure or administration have created new rights not theretofore existing, which ultimately benefited one person as against another. The constitutionality of such legislation, even though it were retroactive in its application to existing actions or proceedings

or to the estates of those dying before the statutory change was enacted, has been time and again sustained by the courts in the interest of uniformity and justice. As, for example, in *Preston Co.* v. *Funkhouser* (*supra*), our Court of Appeals and the United States Supreme Court upheld, as constitutional, a statute retroactive in scope providing that in any action for the enforcement of or based upon breach of performance of a contract, interest shall be allowed upon the sum awarded, whether theretofore liquidated or unliquidated. In that case the Court of Appeals, through Judge Pound, said: "Every change in the remedies open to parties to a contract does not constitute an impairment of its obligation. Where the statute deals only with the remedy, the creation of a new and more adequate remedy does not impair the obligation of the contract. (*Sackheim* v. *Pigueron*, 245 N. Y. 62.) * * * It follows that Section 480 is a [fol. 214] remedial statute to be construed, according to its literal meaning to apply to all actions brought after it went into effect irrespective of the time when the cause of action arose. It changes an existing right of action rather than creates a new right." The court also pointed out that "the mere fact that the statute is retroactive does not bring it in conflict with the Federal Constitution."

It has always been the recognized function of the courts to promulgate rules of procedure and administration for the guidance of fiduciaries in their conduct of trust estates. Such rules have also found expression from time to time by enactment in the various statutes of our State. Examples of remedial statutes modifying or establishing rules of procedure in the administration of existing trusts, where their reasonableness and constitutionality have been sustained, are many. In *Matter of Robertson* v. *de Brulatour* (188 N. Y. 301), after the death of the testator, the Legislature established a new and different rule covering the compensation of trustees. An increased measure of compensation was provided. The trustees were held to be entitled to their benefit and commissions were allowed to them under the statute in effect at the date of the accounting. In *Matter of Barker* (230 N. Y. 364), commissions for receiving assets were allowed to the estates of deceased executors pursuant to a statute in effect at the date of the accounting but which was not enacted until subsequent to the death of the executors, and necessarily of the testator. In re-

ferring to the retroactive effect of the statute, the court there said: "The general rule is that the fees of an executor are to be fixed by the rules and law which prevail at the time when they are settled. (*Robertson* v. *de Brulatour*, [fol. 215] 188 N. Y. 301, 316, 317; *Whitehead* v. *Draper*, 132 App. Div. 799.) In the last case this principle was applied in the opinion written by Justice McLaughlin in a case where the statute invoked in aid of an executor's commissions was not passed until after his death. This is quite akin to the rule that remedies will be applied in accordance with the law which prevails at the time when relief is sought rather than at the time when the injury arose. (*Matter of Berkowitz* v. *Arbib & Houlberg, Inc.*, 230 N. Y. 261.)"

Other instances of remedial statutes may be found in (1) those modifying, after the death of the decedent, the classes of legal securities in which trustees are authorized to invest (*City Bank Farmers Trust Co.* v. *Evans*, 255 App. Div. 135; *Matter of Hamersley*, 152 Misc. 903); (2) the provisions of the Surrogate's Court Act (§§ 225 and 226), providing that an administrator with the will annexed or a successor trustee may exercise powers granted to an executor or trustee to mortgage, lease or sell real property (*Hollenbach* v. *Born*, 238 N. Y. 34); (3) the sections of the Real Property Law authorizing the sale of real property where the interests are both possessory and future (*Matter of Merserau*, 233 N. Y. 540; *Matter of Gaffers*, 254 App. Div. 448) and (4) the statute granting a creditor of an income beneficiary of a trust the right to require that ten per cent of the income be applied in satisfaction of his claim of debt. (*Brearley School* v. *Ward*, 201 N. Y. 358.) The constitutionality of each of these legislative enactments was sustained.

In *Reiner v. Fidelity Union Trust Co.* (126 N. J. Eq. 78, [fol. 216] 8 A. [2d] 175; revd. on other grounds, 127 N. J. Eq. 377, 13 A. [2d] 291) a statute giving the Court of Chancery of the State of New Jersey power to authorize or direct trustees to invest in securities other than those listed by the statutes as legal for trust investments was upheld as constitutional. The court there said: "The statute does not purport to authorize the court to change substantive rights. It has reference merely to matters of administration."

The extent to which courts have gone to sustain rules of procedure and administration is evidenced by the decision of the United States Supreme Court in *Kuehner* v. *Irving Trust Co.* (299 U. S. 445). There, the constitutionality of clause (10) of subsection (b) of section 77B of the Bankruptcy Act (U. S. Code, tit. 11, § 207), which limited the claim of a landlord for indemnity under a covenant in a lease in a corporate reorganization to an amount not to exceed three years' rent, was considered. Prior to the passage of this provision of the Bankruptcy Act, such claim was not provable or dischargeable in a bankruptcy proceeding. Under the new statute, the landlord's claim was allowed to the extent of three years' rent only. The rental value for the balance of the term of the lease under the rent fixed by the lease greatly exceeded the three years' rent allowed. It was asserted that this limitation offended the due process clause of the Fifth Amendment of the Constitution of the United States. The validity and constitutionality of the statute were sustained as giving a new and more certain remedy for a limited amount in lieu of an old remedy, insufficient and uncertain in its result. The statute was held to be fair and reasonable and to create uniformity of treatment of a peculiar class of claims, difficult of liqui- [fol. 217] dation. It was held not to be the taking of the landlord's property without due process of law.

As applied to existing trusts, the above authorities clearly support the validity of the remedial legislation enacted in subdivision 2 of Section 17-c of the Personal Property Law.

The rules under the subdivision are just, fair and reasonable. Only equitable adjustments and balances as between principal and income beneficiaries were declared to be effectuated by its provisions. It was within the province and power of the Legislature to enact them. The objection of the special guardian, therefore, addressed to the constitutionality of the statute is overruled.

Second. Such determination of constitutionality requires the surrogate to pass upon the various questions raised as to the effect of the terms of the new subdivision upon mortgage salvage operations within its scope. These questions are stated and discussed *seriatim* as follows:

(a) Does the section apply to the salvage operation of property acquired by a trustee which was sold before April

13, 1940, the effective date of the statute, where the distribution has not been closed by a decree upon a judicial settlement of the account or by a written or other valid agreement between the parties for a voluntary distribution?

The Surrogate holds that where the salvage operation has been completed before the effective date of the new section, its terms do not in any way alter or change the rights of the parties. Once the salvage operation is finished before that date, there remains nothing to be done except to make the computation of apportionment and to distribute under the *Chapal-Otis* rules. The terms of the statute apply only to uncompleted salvage operations at the date [fol. 218] of its enactment or to operations initiated subsequent to such date.

(b) As to operations uncompleted at the effective date of the new section, shall payments to the life beneficiary of net income, when earned, up to a maximum of three per cent per annum upon the face amount of the mortgage be computed upon an annual basis, or shall the entire period of operation, if extending over a period of more than one year, be considered in such computation?

The answer is obvious. The statute clearly contemplates that the net income payments shall be based upon the annual income of the property and not upon the income for the entire period of the unfinished operation. It provides (Pers. Prop. Law, § 17-c, subd. 2, par. [a]): "Net income during the salvage operation up to three per centum *per annum* upon the principal amount of the mortgage shall be paid to the life tenant * * *." (Italics mine.) Annual rests and annual balancings of the account must thus be employed and the result of the operation of each parcel of property for each year must be treated as a separate entity in the computation and payment of the maximum net income permitted by the statute to be paid to the life beneficiary. It is an elementary rule in the administration of trusts that the computation of net income payable to a life tenant is based upon the yearly period, unless the terms of the will fix some other period. Any other policy would permit serious prejudice on the part of the trustee as against the life tenant by the withholding of accumulated income.

If, therefore, under this method of computation there are deficits of net income in lean years, they may not be made up from surplus net income in productive years. Income earned in any one year in excess of the three per cent [fol. 219] maximum payable to the life beneficiary and after repayment of principal advances, must be retained. Under the new section, principal advances "shall be repaid out of excess net income above such three per centum per annum. When principal advances have been satisfied, any excess income shall be impounded * * * to await sale and apportionment." If the payments of income to the life beneficiary were not based upon annual rests, and the deficiency of net income payments in lean years could be satisfied from excess income in good years, the provision of the statute that such excess income shall be impounded would be nullified.

(c) In the computation of the net income payable to the life beneficiary, shall the fiscal year beginning with the date of the acquisition of the real property be used or shall the calendar year be employed?

I hold that the anniversary date of the computations of the annual payments to the life beneficiary is the date of the acquisition of the real property and the annual rests shall be based upon that date. The period of salvage begins from the date of acquisition of the mortgaged property. (*Matter of Otis, supra.*) The net income payable to the life beneficiary must be computed upon rents received during the fiscal year beginning with that date. It is not based upon rents received during the calendar year. The explanatory note printed in the legislative bill states: "The amendment provides for the immediate payment of income to the life tenant beginning with the date of the acquisition of the property by the trustee by foreclosure or conveyance in lieu of foreclosure." The statute provides that net income shall be paid during the salvage operation. The annual accounts and the computation of the amount [fol. 220] due the life tenant at the statutory rate up to three per centum per annum must be based upon the recurring periods of one year from the anniversary dates of acquisition.

(d) Where net rents up to a maximum of three per cent per annum have been paid to a life beneficiary during the period of salvage, has the new section changed the method

of apportionment to be made after sale, as laid down by the rules in *Matter of Chapal* (*supra*) and *Matter of Otis* (*supra*)? In other words, has the formula for the allocation, as between income and principal, been changed by the terms of the new section? The Surrogate holds that no change was intended by the Legislature.

The new section merely makes mandatory the payments of three per cent of net income each year to a life beneficiary when earned. It does not, however, change the formula for ultimate apportionment of the net proceeds of the salvage operation between life beneficiary and remainderman. Again the new subdivision provides: "The existing rules of procedure applying to salvage operations respecting existing mortgage investments are continued except as modified by the subparagraphs hereinafter set forth." As stated in *Matter of Chapal* (*supra*): "In such an investment situation what is involved is the salvage of a security. The security * * * is a security not for principal alone but for income as well." Paragraph (a) of subdivision 2, with a view to protecting the interests of both life tenant and remainderman in such securities and to impartial and fair apportionment, provides as follows: "The amount of all such payments shall be taken into account, however, in the apportionment of the proceeds of sale and shall be charged against the share of the life tenant." All net in- [fol. 221] come, therefore, including such as had been paid to the life beneficiary during the salvage period, must be added to the proceeds of sale of the property as the total salvage fund. Out of such total there shall first be deducted the amount required for repayment of principal advancements. The balance then remaining shall be apportioned according to the *Chapal-Otis* formula between income and principal. After the share due the life beneficiary has been computed upon such apportionment, there shall first be credited upon such share the net amounts of rents paid to the life beneficiary during the salvage operation as an advancement to income. The amount so paid to the life beneficiary must be "charged against the share of the life tenant" under the new section. The amount apportioned to income, less the income advanced to the life tenant, shall be the balance to which the life tenant shall then be paid out of the proceeds of the salvage operation. This method of determining the ultimate shares allocable to income and principal unquestionably, in my opinion, accords with

proper accounting practice. (*Matter of Chapal, supra; Matter of Otis, supra; Matter of Brainerd*, [WINGATE, S.] 169 Misc. 640, 644.)

Third. The questions presented for determination in this group do not arise out of the provisions of the new section. They involve problems that have not directly been passed upon by the *Chapal-Otis cases* or by other authorities.

(a) Where a trustee has taken over property under foreclosure or by deed in lieu of foreclosure and finds it in such condition as to require rehabilitation, are the expenses incurred to put the property in a tenantable condition exclusively capital charges to be treated as advancements from [fol. 222] principal, or are they income charges?

The Surrogate holds that where at the time of the acquisition of the real property, the premises were not in rentable condition the cost of putting them into such condition is payable out of principal. The cost of thereafter maintaining the premises in repair and in tenantable condition is payable out of income. Under the new paragraph (a) of subdivision 2, the "cost of all capital improvements" is made a principal charge.

As applied to ordinary trust property where no salvage operation is in effect, the rule seems generally to be well settled that where real property is originally received by the trustee in an untenantable condition, the cost of rehabilitation is chargeable against principal. (Restatement of the Law of Trusts, comment i, § 223; *Stevens* v. *Melcher*, 152 N. Y. 551; *Matter of Deckelmann*, 84 Hun, 476; *Matter of Suydam*, 138 Misc. 873; *Smith* v. *Ketcltas*, 62 App. Div. 174; *Matter of Heroy*, 102 Misc. 305.)

In the Restatement of the Law of Trusts the following appears: "The cost of putting into tenantable repair premises which were not in such repair when received by the trustee, whether originally acquired by the trustee as part of the trust property at the time of the creation of the trust or subsequently acquired by him, is payable out of principal; but the cost of thereafter keeping the premises in repair is payable out of income." The application of this rule to salvage operations would appear to be for the best interests of both life beneficiary and remainderman. Whenever necessary repairs or structural changes are made to put real property in a rentable condition, there inures a

benefit to both principal and income beneficiaries. The ex- [fol. 223] penses of rehabilitation, therefore, which are incurred upon the acquisition of the property should be treated as advancements from principal and charged to principal. On the other hand, all expenditures for current repairs and those which are incidental to the management of the property, during the period of the salvage operation, should be charged to income under the general rule laid down in *Matter of Albertson* (113 N. Y. 434). The Surrogate sustains the objections of the special guardian to the payment from principal of sums for the current repair and maintenance of the premises, other than the expenses of putting them into tenantable condition at the date of the acquisition of the property. If the parties are able to agree as to the items properly chargeable to income under this determination, a stipulation may be filed within ten days of this decision. If agreement is not reached, the matter will be set down for a further hearing upon this issue.

(b) The further question has been raised as to what is the method of apportioning dividends which may be received in payment, partially or in full, of claims arising out of the guaranty against loss resulting from a defaulted mortgage by an insolvent mortgage guaranty company. Certain sums have been received by the trustee in this estate on claims allowed by the Superintendent of Insurance, as liquidator of the Bond and Mortgage Guarantee Company. All of the properties involved were acquired by foreclosure or by deed in lieu of foreclosure prior to December 31, 1937. The order of liquidation was made and the rights of the parties under the Insurance Law are to be determined as of that date.

[fol. 224] The obligation of the Bond and Mortgage Guarantee Company constituted a guaranty as to both interest and principal. The trustee filed proofs of claim with the Superintendent of Insurance. These claims covered the deficit of interest up to December 31, 1937, and the alleged liabilities of the guarantor for restitution of principal losses. In each case the default in interest was allowed by the Superintendent in full. The claims for principal charges were substantially reduced by him.

The Surrogate holds that liquidating dividends when received must be treated as part of the general funds developed from the salvage operation. In this sense they are

like rents received and the proceeds of sale of the acquired real property. The allocation made by the Superintendent of Insurance as between the guaranty of losses incurred in income and the guaranty of losses incurred in principal is to be treated as tentative only. In addition, all of the parties here conceded that because of the very large liabilities of the guaranty company, the dividends will be relatively small in amount. Moreover, the application of these liquidating dividends should be made as simple as possible.

With this objective in mind the Surrogate holds that as to dividends received for income losses from the Superintendent of Insurance, such amounts should be added to the income (derived as rents) during the specific year of the actual reception of the liquidating dividends. This addition to such rents may still leave a deficit in operation with no *net* rents available for the fiscal year. On the other hand, the addition may wipe out a deficit and produce a net income for such year. In the latter case the moneys become payable within the three per cent maximum to the life [fol. 225] tenant. If there be any surplus above the three per cent maximum caused by the addition of these dividends, such surplus shall, under the rule of Section 17-c, be applied on account of advances to principal, or if such advances have been satisfied, they shall be retained as part of the general funds of the salvage operation to await sale and final apportionment.

Any dividends received from the Superintendent of Insurance as tentative payments upon principal account shall likewise be retained as part of the general proceeds of the salvage operation to await final sale and apportionment, unless necessary to discharge unpaid balance of principal advancements.

Any dividends which may be received by the trustee on its claim under the guaranty of a mortgage subsequent to the completed salvage of such mortgage, should likewise be apportioned between principal and income in the same ratio as has been applied to the proceeds of sale. They are additional proceeds of the salvage operation.

(c) Where the mortgage was originally guaranteed as to payment of interest and principal by a mortgage guaranty corporation and the guaranty has been canceled by the trustee, because of the insolvency of the corporation,

shall the share of the life beneficiary be computed upon the rate fixed in the mortgage or at the rate agreed to be paid by the guaranteeing corporation? In other words, assume an original mortgage was made with six per cent interest. The corporation has reserved to itself, as the usual charge for the guaranty, one-half of one per cent per annum. The purchaser of the mortgage from the cor- [fol. 226] poration became originally entitled to five and one-half per cent. Where the agency of the guarantor has been canceled, is the share of the life beneficiary to be computed for the duration of the period of salvage at six per cent per annum, the rate set forth in the instrument or at five and one-half per cent?

I hold that the rate of interest fixed in the mortgage taken over by the trustee from the guaranty company is the rate upon which the life beneficiary's interest must be computed. The Court of Appeals in *Matter of Otis* (*supra*) declared the rate of interest as fixed in the mortgage to be the rate to be used as a basis upon which allocation to income was to be made. It said: "We prefer to adhere to our ruling in *Meldon* v. *Devlin* (167 N. Y. 573, affg. 31 App. Div. 146) that interest should be computed at the mortgage rate for the whole period." Although the Court of Appeals in that case did not have before it the exact question here involved, its preference to the adoption of a rule which would fix the mortgage rate upon the cancellation of a guaranty, would appear to be clearly indicated. In view of the determination in *Matter of Otis* (*supra*), it is immaterial that only a yield of five and one-half per cent was guaranteed by the guaranty corporation.

Where, however, prior to acquisition by foreclosure or by deed in lieu of foreclosure, the trustee and the owner of the property have by agreement fixed a rate of interest below the rate prescribed in the mortgage instrument itself, the reduced rate shall be used and not the mortgage rate. Such agreement for reduction of interest, if validly made, is binding upon the parties.

In the present proceeding, the trustee, by letter dated [fol. 227] October 22, 1934, agreed to reduce the interest rate in the mortgage on one parcel of real property, 240 Floyd street, Brooklyn, N. Y., from six per cent to four per cent. The interest of the life tenant in the salvage operation must, therefore, be computed at the latter rate from the date of such reduction to the date of sale.

(d) Further questions have been presented as follows:

Where there has been a resale of the foreclosed property and a purchase-money mortgage has been taken back, shall amortization payments under the new mortgage received by the trustee be applied primarily to the discharge of unpaid principal advances for the prior salvage operation, if any are still due? Where principal advances have been entirely repaid, shall amortization payments on the purchase-money mortgage be allocated between life tenant and remainderman as fixed upon apportionment of the proceeds of sale, pursuant to the applicable rules, upon the completion of the prior salvage operation?

The answer to each of these two questions must be in the affirmative. Since unpaid principal advances are a prior lien upon the proceeds of sale of the salvaged property (*Matter of Chapal, supra; Matter of Otis, supra;* Pers. Prop. Law, § 17-c), principal has a prior interest in or lien upon the purchase-money mortgage taken back by the trustee upon the sale. In those circumstances, amortization payments made by the new mortgagor should be credited entirely to principal on account of such prior lien. When the principal advances have been entirely repaid, the amounts received for amortization should be apportioned between principal and income in accordance with the respective shares of each, previously computed and apportioned under the *Chapal-Otis* rule. The interest received [tols. 228-234] by the trustee on the purchase-money mortgage I hold is payable to the life beneficiary. A similar conclusion was reached in *Matter of Martin* (165 Misc. 597).

(e) One further question requires disposition. It is claimed by the income beneficiary that she should be allowed interest at the prevailing rate upon the rents withheld from her by the trustee, which were distributable under section 17-c, from the date of their receipt by the trustee until their payment. The claim is disallowed. The Surrogate holds she is entitled to no interest on such rents under the circumstances of this proceeding. In a case where the trustee arbitrarily refuses to pay, interest might be awarded against him for his recalcitrancy and by way of compensation for the detriment suffered by the life tenant.

The objections filed to the account herein are disposed of as follows:

Objections I, II, III, IV, V and VII filed by the special guardian are overruled. Objection VI, relating to the charging of expenditures for repairs, has been the subject of instructions and possible further hearing in the prior portion of this decision.

Objections 5 and 9 of the life beneficiary are overruled. The remaining objections filed by her are sustained to the extent of directing the necessary readjustments to be made in the account to comply with the conclusions of the Surrogate contained in this decision.

Submit decree on notice settling the account in accordance with this decision and with the prior decision construing the will (175 Misc. 1042) made in this proceeding.

[fol. 235] In Surrogate's Court, New York County

Notice of Appeal to Court of Appeals of Infant Appellants, William J. Demorest, Jr., Ann Demorest and Carolyn Demorest

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Please take notice that the infants William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, and the undersigned, as special guardian of the said infants, hereby appeal to the Court of Appeals from the resettled order herein of the Appellate Division of the Supreme Court for the First Department, dated and entered in the Office of the Clerk of said Appellate Division on April 16th, 1942, unanimously affirming the final decree herein of the Surrogate's Court, of the County of New York, made and entered [fols. 236-244] on September 9th, 1941, and that said infants and the undersigned as special guardian, hereby appeal from said order of the said Appellate Division insofar as it sustains the constitutionality of Section 17-c, subdivision 2, of the Personal Property Law of the State of New York.

Dated: New York, N. Y., April 16th, 1942.

Gerald P. Culkin, *Special Guardian.*

To: Larkin, Rathbone & Perry, Esqs., *Attorneys for Emma M. West, Appellant-Respondent,* Office and P. O. Address,

70 Broadway, New York City. Mitchell, Taylor, Capron & Marsh, Esqs., *Attorneys for City Bank Farmers Trust Company, as trustee, etc., Respondent* 20 Exchange Place, New York City. Butler, Wyckoff & Reid, Esqs., *Attorneys for Marie Elizabeth West Jones and Elizabeth Frances Jones, Respondents*, 165 Broadway, New York City.

[fol. 245] In Supreme Court of New York, Appellate Division

Present: Hon. Francis Martin, *Presiding Justice* Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Edward S. Dore, Hon. Joseph M. Callahan, *Justices*.

In the matter of the Judicial Settlement of the Account of Proceedings of City Bank Farmers Trust Company as Trustee of the trusts created under the Last Will and Testament of Henry C. West, Deceased, and of the Application of City Bank Farmers Trust Company as Trustee as aforesaid, for a Determination as to the Construction and Effect of said testator's Last Will and Testament, and for Instructions and Directions as to the Manner and Method of Allocation and Distribution of the Funds which are now or may hereafter be in its hands as Trustee as aforesaid.

William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, *Infant Appellants*, Emma M. West, *Appellant*, City Bank Farmers Trust Company, as trustee, etc., *Respondent*, Marie Elizabeth West Jones and Elizabeth Frances Jones, *Respondents*.

Order as Resettled—Dated April 16, 1942

[fol. 246] A motion having been made by Gerald P. Culkin, special guardian for William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, infant appellants herein, for a resettlement of the order made herein and entered and filed in the office of the Clerk of this Court on the 2nd day of April, 1942, and Emma M. West, City Bank Farmers Trust Company, as trustee under the last will and testament of Henry C. West, deceased, Marie Elizabeth West Jones and Elizabeth Frances Jones having waived notice of said

motion and approved of such resettlement of said order;

Now, upon reading and filing the annexed affidavit of Gerald P. Culkin, sworn to the 8th day of April, 1942, and the annexed waiver of notice and approval of such resettlement, it is

Ordered that said order be and the same hereby is resettled to read as follows:

[fol. 247] At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on the 2nd day of April, 1942.

Present: Hon. Francis Martin, *Presiding Justice*, Hon. Alfred H. Townley, Hon. Edward J. Glennon, Hon. Edward S. Dore, Hon. Joseph M. Callahan, *Justices*.

[fols. 248-249] An appeal having been taken to this Court by Gerald P. Culkin, as Special Guardian for the infant appellants William J. Demorest, Ann Demorest and Carolyn Demorest, from a decree of the Surrogate's Court of the County of New York entered in the Surrogate's Court on the (9th) day of September, 1941, except so much thereof as determines the true meaning and construction of the Fifth Clause of the last will and testament of Henry C. West, deceased, and directs the disposition of the income from the trust created under said clause, to wit, paragraph "1" to "4" thereof, and excepting so much of said decree as fixes the amount and directs the payment of costs, disbursements, fees, and allowances to counsel and Special Guardian;

And an appeal having been taken by Emma M. West from so much of said decree as is specified in her notice of appeal,

And said appeal having been argued by Mr. Francis J. Mahoney of counsel for Gerald P. Culkin, Special Guardian for the infant appellants, by Mr. Albert Stickney of counsel for Emma M. West appellant and respondent, and by Mr. C. Alexander Capron of counsel for the respondent trustee; and due deliberation having been had thereon;

It is hereby unanimously ordered and adjudged that the decree so far as appealed from be and the same is hereby affirmed, with costs to the respondent trustee and one bill of costs to the infant appellants, William J. Demorest, Jr., Ann Demorest and Charles Demorest, payable out of the fund.

Enter, A. H. T.

[fol. 250] STIPULATION WAIVING CERTIFICATION OF RECORD TO COURT OF APPEALS

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true copies of the notice of appeal to the Court of Appeals of William J. Demorest, Jr., Ann Demorest and Caroline Demorest, infants, and their special guardian Gerald P. Culkin, Esq.; the notice of appeal to the Court of Appeals of Emma M. West; the order of the Appellate Division granting leave to appeal to Emma M. West; the order of the Appellate Division affirming the decree of the Surrogate's Court dated April 2, 1942; the order of the Appellate Division dated April 16, 1942, resettling said order dated April 2, 1942, and all of the papers on which the courts below acted on making said order of affirmance, all of which are now on file in the office of the Clerk of the Surrogate's Court, County of New York, or the office of the Clerk of the Appellate Division of the Supreme Court, First Department. Certification thereof is hereby waived.

Dated: May 14, 1942.

Gerald P. Culkin, Special Guardian for Infant Appellants; Larkin, Rathbone & Perry, Attorneys for Emma M. West, Appellant; Mitchell, Taylor, Capron & Marsh, Attorneys for City Bank Farmers Trust Company, as Trustee, etc., Respondent; Butler, Wyckoff & Reid, Attorneys for Marie Elizabeth West Jones and Elizabeth Frances Jones, Respondents.

[fol. 251] Certificates to opinion of Court of Appeals omitted in printing.

[fol. 252] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Estate of Henry C. West, Deceased: WILLIAM J. DEMOREST, JR., et al., Appellants; CITY BANK FARMERS TRUST COMPANY, as Trustee, et al., Respondents

Appeal by William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, infants, and their special guardian,

from an order of the Appellate Division of the Supreme Court in the first judicial department, entered April 16, 1942, which unanimously affirmed, so far as appealed from, a decree of the New York County Surrogate's Court (Foley, J.) settling the accounts of City Bank Farmers Trust Company, as trustee under the will of Henry C. West, deceased, and construing the will of the testator. The appeal is from such order of the Appellate Division in so far as it sustains the constitutionality of subdivision 2 of section 17-c of the Personal Property Law (Cons. Laws, ch. 41).

Appeal by Emma M. West, by permission, from so much of such order of the Appellate Division as unanimously affirmed portions of the decree contained in articles 6, 7, 21, 22 and 26 thereof.

Francis J. Mahoney for Gerald P. Culkin, as special guardian for William J. Demorest, Jr., et al., infants, appellants.

Albert Stickney and *Albert J. Maginnes* for Emma M. West, appellant and respondent.

C. Alexander Capron and *J. Karr Taylor* for City Bank Farmers Trust Company, as trustee, respondent.

OPINION—January 14, 1943

FINCH, J.:

The question presented for decision is the constitutionality and construction of the provisions of subdivision 2 of section 17-c of the Personal Property Law (L. 1940, ch. 452, effective April 13, 1940; Cons. Laws, ch. 41) in so far as the same modify retroactively the rules relating to mortgage salvage operations.

The new statutory rules allot to the life tenant out of the net income earned from the operation of real estate in salvage, an annual amount up to three per cent of the face value of the mortgage investment. Such right is granted in lieu of the discretion vested in the trustee under the heretofore existing rules of trust administration to pay net income or any portion thereof to the life tenant, a discretion which has not been exercised generally by trustees through fear of possible surcharge. Such payment of net income is made payable from the beginning of the salvage operation and is declared to be final and not subject to recoupment, either from the life tenant, or from the trustee or executor by way of surcharge. With the exception of the aforesaid modification, the previously existing rules governing sal-

vage operations are continued except that annual net income in excess of the maximum sum payable to the life beneficiary, is directed to be held and further equitable adjustments upon the apportionment are also provided for, in order to insure to the remainderman that any unpaid advances from principal must be first repaid upon the final liquidation of the investment.

[fol. 253] The validity of this statute has been put in issue upon this proceeding for an intermediate accounting by the trustee under the will of Henry C. West. By the terms of the testator's will, his residuary estate was devised to a trustee to apply the net income therefrom to the use of his wife during her life or until her remarriage. Upon the termination of the life estate, the trust was directed to be divided and continued upon certain shares for the benefit of a nephew and niece of the testator, with remainders over.

At the time of his death in 1934, the testator's residuary estate included, among various other assets, certain wholly owned guaranteed mortgages. Nine of these mortgages went into default after the death of the testator, and the estate acquired title to the real properties either by foreclosure or by deed in lieu of foreclosure prior to April 13, 1940; two of the properties were sold before that date, the income and proceeds therefrom, however, being retained in the hands of the trustee.

In the present proceeding the special guardian for the infant remaindermen contends, first, that the entire subdivision 2 of section 17-c is unconstitutional because it is expressly made retroactive in operation, and that, second, if constitutional, it does not apply, as a matter of construction, to the proceeds of the two properties which were sold before the statute became effective. The learned Surrogate sustained the constitutionality of the statute, but held as a matter of construction that it applied only to salvage operations uncompleted at the date of its enactment and hence was inapplicable to the two properties sold before it became effective. Upon appeal, the Appellate Division unanimously affirmed.

When a mortgage in default is foreclosed and title to the property is acquired by the trustee, the original mortgage investment is at an end and a salvage operation is initiated. (*Matter of Otis*, 276 N. Y. 101, 111, 112.) The real property thus acquired is substituted for the mortgage in the hands of the trustee and takes on the character of personalty

(*Lockman* v. *Reilly*, 95 N. Y. 64, 71.) The trustee holds this real property so acquired and must administer it as an asset of the trust estate for the benefit of the life tenant and the remaindermen. Like the mortgage, it is "security not for principal alone but for income as well." (*Matter of Chapal*, 269 N. Y. 464, 472.) With respect to the mortgages which the testator owned at the time of his death and with respect to any real property which might be acquired by the trustee following default in any of these mortgages, the testator as creator of the trust gave no express directions except the general direction of what is commonly understood by the use of the words "income" and "principal." After the initiation of the salvage operation, as before, both the life tenant and the remaindermen could compel the trustee to administer the trust and to apportion to each his just share of the income and principal, but not that of any particular asset of the trust. (*Lockman* v. *Reilly*, 95 N. Y. 64, 71; *Bennett* v. *Garlock*, 79 N. Y. 302, 320.) Although the rule requiring apportionment as between income and principal, [fol. 254] of the proceeds of such sale has been long established (*Meldon* v. *Devlin*, 31 App. Div. 146; affd., 167 N. Y. 573), the rules relating specifically to mortgage salvage operations were speeded in the process of formulation by the courts with the coming of the economic depression of the 1930's. In *Matter of Chapal* (269 N. Y. 464) this court said: "We have another problem—that of the liquidation of real estate acquired of necessity because of default on a mortgage investment." Concerning these rules thus worked out to meet the emergency resulting from widespread foreclosures, in *Matter of Otis*, *supra*, at page 112, we said: "Both capital account and income account, as described in the *Chapal* case, are fictions * * *. If, then, the remaindermen are to participate in the apportionment on the feigned basis of unimpaired principal, the share of the life tenant should be computed on the same assumption. The invention of the 'original investment' is no more valid than the invention of 'unpaid interest' thereon. Indulgence in both fictions keeps the balance even between the respective parties in interest."

Moreover, we expressly said in the *Otis* case that the rules laid down were tentative only and not intended to be final. At page 115 it was said: "Perhaps it should be added that a general rule for such situations cannot be attained at a bound, that no rule can be final for all cases

and that any rule must in the end be shaped by considerations of business policy. Accordingly, we have here put aside inadequate legal analogies in the endeavor to express fair, convenient, practical guides that will be largely automatic in their application. Only the sure result of time will tell how far we have succeeded." It was also carefully pointed out that no hard and fast rule was laid down to guide the trustee in the disposition of net income earned during the salvage operation, but the disbursement of net income to the life beneficiary was left to the discretion of the trustee. In the *Otis* case we said at page 115: "* * * the trustee may distribute such surplus income in its discretion. (269 N. Y. at p. 470). This discretion, moreover, should be exercised with appropriate regard for the fact that unless a life tenant gets cash he does not get anything in the here and now."

The Legislature has found, however, that trustees through fear of surcharge have accumulated surplus with the result that undue hardship has been visited upon life beneficiaries. Taking heed of this hardship at the request of the executive committee of the Surrogate's Association of the State of New York, the Legislature has declared its purposes in the statute itself. In part it reads: "The purpose of the enactment of this subdivision is declared to be the simplification of the rules of procedure in mortgage salvage operations and the elimination of present complications which work to the disadvantage of the life tenant * * * by depriving him of a fixed right to the actual payment of any net income earned by the property. Such fixed right is granted in lieu of the discretion now given to the trustee to pay net income or any part thereof to the life tenant. * * * Only equitable adjustments and balances as be- [fol. 255] tween the parties are intended to be effectuated by the provisions of this subdivision." Thus the Legislature has substituted in place of the discretion in the trustee permitting disbursement of surplus income, another more definite rule requiring some, albeit modest, payment of surplus income to the life beneficiaries. At the same time the Legislature has provided that additional income over and above the modest rate of payment shall be held until final adjustment, thus providing for equitable adjustments and balances as between life beneficiaries and remaindermen upon final liquidation, and safeguarding, so far as reasonably possible, the rights of all interested parties.

The statute provides: "Any payment of net income heretofore or hereafter made to the life tenant up to such three per centum per annum shall be final and shall not be subject to recoupment from the life tenant or as a surcharge against the trustee or executor. The amount of all such payments shall be taken into account, however, in the apportionment of the proceeds of sale and shall be charged against the share of the life tenant.

In thus formulating a rule that is final against recoupment for distribution of income received in excess of carrying charges, it does not appear that the Legislature has done more than direct a trustee to do what under the decisions of this court he has discretionary power to do. (*Matter of Otis, supra.*) Before the enactment of this statute, the life tenant could not have demanded as of right the payment to him during liquidation of more of the surplus income than he will receive under the statute. Neither does it appear that the remaindermen could properly have insisted that the trustee should be surcharged if in the exercise of his discretion he had paid to the life tenant the amount which the statute now directs. A statutory rule of administration which requires the trustee to apportion income in accordance with a fixed standard which in the exercise of administrative discretion the trustee would even without the statute have power to adopt does not, in our opinion, constitute a taking of property. The principle is applicable that "The mere fact that the statute is retroactive does not bring it in conflict with the Federal Constitution. * * * Nor has a person a vested interest in any rule of law entitling him to have the rule remain unaltered." (*Preston Co.* v. *Funkhouser*, 261 N. Y. 140, 144; *Munn* v. *Illinois*, 94 U. S. 113.)

As already noted, the rules of administration heretofore set forth were tentatively stated and expressly recognized as subject to change. Before a judicial declaration, thus tentatively stated, becomes a rule of property, it must have become permanently fixed and long continued. (*United States* v. *Standard Oil*, 20 Fed. Supp. 427, 458; affd., 107 F. [2d] 402, cert. den. 309 U. S. 673.) In that case the court said: "However, before setting up a judicial declaration as a rule of property, we should require, at least, that it be fixed, long-continued, and relied upon by persons acquiring property, so that its repudiation would amount to a denial of due process." Nor can the statute in the case

[fol. 256] at bar be said to be arbitrary or capricious, but on the contrary, it is fair and reasonable and protects the interest of both income beneficiaries and remaindermen. As was said in *Thompson* v. *Siratt* (95 F. [2d] 214, 217): "To hold that subsection (n) is repugnant to the Fifth Amendment requires a finding that its provisions are arbitrary and unreasonable."

We have, therefore, in the case at bar, no taking of property, no contract right involved and no impairment of due process. This statute, therefore, cannot be held to be unconstitutional. (*Robertson* v. *deBrulatour*, 188 N. Y. 301; *Brearley School, Ltd.*, v. *Ward*, 201 N. Y. 358.)

The sole remaining question is whether or not the statute is applicable in cases where the liquidation was complete before the date when the statute became effective, the income and proceeds of property being still undistributed in the hands of the trustee. We concur in the construction placed upon the statute by the learned Surrogate, namely, that its scope is limited to cases where liquidation of real property acquired is incomplete. This is in accord with the language of the statute which provides that net income "during the salvage operation" shall be paid to the life tenant. Even in a "pending proceeding" or "action for an accounting," the language of the statute confines its application to cases where liquidation is incomplete and where "during the salvage operation" a trustee has acted in accordance with the discretion at that time invested in him. The apportionment of the proceeds of the property, both income and principal, where liquidation was completed before the statute became effective must be determined in accordance with the rules heretofore formulated by the court.

The order should be affirmed, with costs payable to the respondent trustee and one bill of costs to the infant appellants, William J. Demorest, Jr., Ann Demorest and Charles Demorest, payable out of the fund.

DISSENTING OPINION

LEWIS, J. (dissenting):

The infant-appellants, by their special guardian, challenge the constitutionality of section 17-c, subdivision 2, of the Personal Property Law (Cons. Laws, ch. 41). The problem relates to the apportionment, between an income

beneficiary and remaindermen, of income realized by a trustee from operations undertaken to salvage defaulted mortgages held by it as fiduciary. In this instance the mortgages in default were nine in number. The title to each mortgaged property came into the trustee either by foreclosure or by deed in lieu of foreclosure prior to April 13, 1940. Two of the properties were sold prior to that date, the avails of the sale being retained by the trustee.

The date last mentioned is important to our inquiry because it fixes the time when there became effective chapter 452 of the Laws of 1940 which added section 17-c to the Personal Property Law. It is the effect upon the rights of a life tenant and remaindermen of the retroactive provisions of subdivision 2 of that statute which has prompted the present challenge to its constitutionality.

Section 17-c of the Personal Property Law (added by L. 1940, ch. 452, effective April 13, 1940) provides rules for the administration of that portion of a trust fund in which is a [fol. 257] real estate mortgage, held for the benefit of one or more tenants for life or a limited term with remainder over, where title to the mortgaged property has been acquired by the trustee by foreclosure or by conveyance in lieu of foreclosure. We are not here concerned with subdivision 1 of section 17-c which applies only to estates of persons dying, or trusts created, *after* its enactment and to mortgage investments made thereafter by a trustee of an existing trust. The challenge is to the constitutionality of subdivision 2 of section 17-c, the terms and rules of which "apply specifically (a) to the estates of persons dying *before* its enactment and (b) to mortgages on real property held by a trustee under a deed of trust or other instrument executed *before* the date of its enactment and (c) to real property acquired by foreclosure of mortgage or real property acquired in lieu of foreclosure *before* or after the date of its enactment in trusts created or mortgage investments made prior thereto * * *." (Emphasis supplied.) In particular our inquiry goes to that portion of section 17-c to be found in subdivision 2 (a) which in general provides that, regardless of advances made from the principal of a trust for the expense of a foreclosure, or of a conveyance of mortgaged property in lieu of foreclosure, and regardless of the cost of all capital improvements, payments—not subject to recoupment—shall be made to the life tenant from

the net income during the salvage operation up to three per cent per annum computed upon the principal amount of the mortgage.

Clearly subdivision 2 of section 17-c is retroactive. By its terms it presumes to affect acts which occurred, and rights which accrued, prior to April 13, 1940—the effective date of the statute. Among acts thus affected was the execution on December 14, 1928, of the testamentary trust here involved; among rights thus affected are those of the life tenant and the remaindermen in the proceeds from transactions undertaken by the trustee as a means of salvaging mortgages which were a part of that trust—mortgages which, as we have said, were "security not for principal alone but for income as well." (*Matter of Chapal*, 269 N. Y. 464, 472.)

In the case last cited this court ruled that, upon a sale had in the course of a similar salvage operation (p. 472)—"* * * the proceeds should be used first to pay the expenses of the sale and the foreclosure costs and next to reimburse the capital account for any advances of capital for carrying charges not theretofore reimbursed out of income from the property. Then the balance is to be apportioned between principal and income in the proportion fixed by the respective amounts thereof represented by the net sale proceeds. In the capital account will be the original mortgage investment. In the income account will be unpaid interest accrued to the date of sale upon the original capital." (And see *Matter of Otis*, 276 N. Y. 101, 111; *Matter of McManus*, 282 N. Y. 420, 425.)

When the properties here involved came into the hands of the trustee, the rule of apportionment last quoted above was not a matter of grace as the majority opinion herein [fol. 258] seems to hold. It was a rule of property the essential principle of which had long been recognized and applied in this jurisdiction and others, including England. (*Meldon* v. *Devlin*, 31 App. Div. 146; affd., 167 N. Y. 573 [1901]; *Parsons* v. *Winslow*, 16 Mass. 361, 365 [1820]; *Veazie* v. *Forsaith*, 76 Me. 172 [1884]; *Hagan* v. *Platt*, 48 N. J. Eq. 206, 207, 208 [1891]; *Greene* v. *Greene*, 19 R. I. 619, 621-624 [1896]; *Quinn* v. *First Nat. Bank*, 168 Tenn. 30 [1934]; *Matter of Nirdlinger*, 327 Penn. St. 171, 172, 173 [1937]; *Cox* v. *Cox*, L. R. 8 Eq. 343, 344, 345 [1869]; *Matter of Moore*, 54 L. J. Ch. 432 [1885], and see *Matter of Mar-*

shall, 43 Misc. Rep. 238, 245 [1904].) A classical statement of the underlying principle which runs through the cases cited above was made in *Cox* v. *Cox*, *supra*, page 344 as follows: "The true principle *in all these cases is*, that neither the tenant for life nor the remainderman is to gain an advantage over the other—neither is to suffer more *damage* in proportion to *his estate and interest* than the other suffers—from the default of the obligor." (Emphasis supplied.) This was orthodox doctrine long before the decisions by this court in the *Meldon*, *Chapal* and *Otis* cases, *supra*.

In accord with that rule of property there had vested in the income beneficiary and the remaindermen respectively, prior to the effective date of section 17-c, subdivision 2, a proprietary interest in each of the properties acquired by the trustee. (*Matter of McManus*, *supra*, p. 426.)

Although the basis adopted by the courts for computing the item of interest involved differs in the various jurisdictions which have considered the question, there is a basic principle, as we have seen, which runs throughout the decisions cited above—*viz.*, that, in the proceeds from salvage operations incidental to the administration of a trust estate, both life tenant and remainderman have a proprietary interest and both are entitled to be paid their proportionate shares thereof.

The comment made in *Matter of Rogers* (22 App. Div. 428; affd., 161 N. Y. 108), by Mr. Justice Cullen—later Chief Judge of this court—applies with equal force in the case at hand where the rights of remaindermen are at stake (p. 436)—"The equities of a life tenant to receive the whole income that may accrue during his tenancy are every whit as great as that of the remaindermen to have the *corpus* of the trust preserved unimpaired. * * * *Why should each not have exactly his own, so far as it is possible to ascertain it?*" (Emphasis supplied.)

A marked difference should be noted between the provisions of section 17-c, subdivision 2, with which we are here concerned, and subdivision 1 of the same section. Unlike subdivision 2, the Legislature was careful in subdivision 1 to make its mandates in effect prospective—not retroactive. It also employed language by which its mandates would in no event conflict with any contrary intention which might be expressed by the creator of the trust.

[fol. 259] The resultant effect of section 17-c, subdivision 2, is to transfer, without the right of recoupment, from the principal account of a trust to the income account, an amount—fixed arbitrarily and without regard to the demands of justice and equity in the circumstances at three per cent per annum computed upon the principal amount of each salvaged mortgage. Such a mandatory transfer to the life tenant of property rights which had become vested in the remaindermen under a rule of property which antedated the exactment of section 17-c, subdivision 2, transcends the Legislature's power. "Legislation which impairs the value of a vested estate is unconstitutional." (*Matter of Pell*, 171 N. Y. 48, 52, 53; *People* v. *O'Brien*, 111 N. Y. 1, 57-59; *Westervelt* v. *Gregg*, 12 N. Y. 202, 212.) As I view the statute it authorizes, without due process of law, the taking of property rights which became vested in the remaindermen under an established rule of property prior to the effective date of the statute. To that extent it violates the Fourteenth amendment to the Federal Constitution and article 1, section 6, of the Constitution of the State of New York.

I pass now to a phase of the problem which I think cannot be ignored. The questions of apportionment with which subdivision 2 of the statute attempts to deal are essentially judicial questions. This subject was examined by Story in his Equity Jurisprudence ([2d ed.] vol. 1, § 489 *et seq.*) Stressing the "beneficial operations of courts of equity * * * upon this confessedly intricate subject," he said: "Without some proceedings, in the nature of an account before a Master, there would be no suitable elements upon which any court of justice could dispose of the merits of such cases." In like vein it was said by Judge Loughran writing for this court in *Matter of Otis*, *supra* (p. 115), that "* * * a general rule for such situations cannot be attained at a bound, that *no rule can be final for all cases* and that any rule must in the end be shaped by considerations of business policy." Subdivision 2 of the statute attempts to override all this by saying that *in every case* the life tenant must at all events immediately and finally receive net income at a rate arbitrarily fixed by the statute at three per cent—no matter what may be the cross-equities of the parties and without regard for the business risks of the particular salvage operations. To this extent, subdivision 2 of the statute makes it mandatory that the court

shall adjudicate every "pending proceeding, or action for an accounting" without affording the parties any opportunity to be heard. The draftsmen of the statute apparently recognized some difficulty on that score, for the statute says: "Only *equitable* adjustments and balances, *as between the parties* are intended to be effectuated by the provisions of this subdivision" [2]. (Emphasis supplied.) We have, then, this extraordinary situation: While subdivision 2 of the statute has not changed the law that pending questions of apportionment are to be decided upon equitable principles, yet it declares that such principles must be applied by the courts, not according to the judicial judgment of what is equitable in the circumstances of a pending controversy, but according to a legislative mandate rigidly enjoined for all pending cases.

[fol. 260] The Legislature has no power so to declare the law "for the information and government of the courts in the decision of causes before them." (Kent, Ch. J., in *Dash* v. *Van Kleeck*, 7 Johns. 477, 508, 509.) In this connection it should be observed that subdivision 2 of the statute is not emergency legislation; it invokes neither the general welfare nor any other consideration of public policy. In the only opinion written below, it is said: "The Legislature has done no more in formulating a modification of existing rules than the courts themselves could do. * * *." (175 Misc. 1044, at p. 1050.) Such a proposition is not free from risk. Nobody knows what economic chaos may follow the present war. I am not prepared to say that as to all pending cases the Legislature may do at one stroke whatever courts of justice may do in accord with their tradition to proceed only in a particular controversy and only after taking evidence at a hearing held upon issues defined by pleadings. The Legislature can no more exercise judicial power than our courts can exercise legislative power. (See opinion by Ruffin, C. J. in *Hoke* v. *Henderson*, 25 Amer. Dec. p. 686 [N. C.].) The determination of rights of property *inter partes* is always a judicial question. As I view it, subdivision 2 of section 17-c of the Personal Property Law is a void attempt by the Legislature to make such a determination.

I am led by these considerations to dissent and vote for a modification of the Surrogate's decree accordingly.

Loughran, J. (dissenting). I add a few words to the dissenting opinion of Judge Lewis in which I concur entirely.

The crux of the prevailing opinion is this striking sentence: "A statutory rule of administration which requires the trustee to apportion income in accordance with a fixed standard which in the exercise of administrative discretion the trustee would even without the statute have power to adopt does not, in our opinion, constitute a taking of property." I cannot assent to so free an appraisal of the retroactive mandate of the Legislature.

No authority is cited to show that it was always open to trustees of their own motion to pay net income to a life tenant at such a "fixed standard," in peremptory disregard of the recoupment rights of remaindermen. Indeed, the general understanding of the profession appears to have been the other way, seeing that the Surrogates who devised the statute have vouchsafed us one reason alone for its enactment, *viz.*, "Trustees have hesitated to pay such net income because in the case of overpayment to the life tenant, the trustee might be surcharged with that amount." (See L. 1940, p. 1182.)

This recognition by trustees of the conflicting rights of remaindermen was not without justification. It is true that hitherto a trustee for a life tenant and remaindermen was entitled to distribute surplus income in his discretion. (*Matter of Otis*, 276 N. Y. 101, 115.) But that discretion was always to be exercised by a trustee with reasonable judgment and with an even hand between the life tenant [fol. 261] and the remaindermen in the particular circumstances. (*See Carrier* v. *Carrier*, 226 N. Y. 114, 125, 126; 28 Halsbury's Laws of England, (1st ed.) 123, 124; 2 Scott on The Law of Trusts, § 187; 4 Pomeroy on Equity Jurisprudence, [5th ed.] § 1062a.) The retroactive provisions of the statute direct trustees instanter to make final payment of net income to a life tenant not at a fixed rate merely, but at the expense of the remaindermen if need be. Hence I cannot accept the presupposition that the statute confers no new power upon trustees.

There is no occasion now for examination of the real nature of the equitable right of a trust beneficiary. At least the beneficiary owns the obligation of the trustee—

a thing which is as truly the subject-matter of property as any physical object. (See Ames, Lectures on Legal History, p. 262. Cf. 1 Scott on The Law of Trusts, § 130.) Consequently I see no warrant for the view that the respective interests of beneficiaries of a discretionary trust are not rights of property in the constitutional sense. (See *Pritchard* v. *Norton*, 106 U. S. 124, 132.)

Lehman, Ch. J., Rippey, Conway and Desmond, JJ., concur with Finch, J.; Lewis and Loughran, JJ., dissent in separate opinions in which both concur.

Order affirmed, etc.

[fol. 262] In Court of Appeals of New York

State of New York, ss:

Pleas in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 14th day of January, in the year of our Lord one thousand nine hundred and forty-three, before the Judges of said Court.

Witness, The Hon. Irving Lehman, Chief Judge, Presiding. John Ludden, Clerk.

In the Matter of the Judicial Settlement, &c., of City Bank Farmers Trust Company, as Trustee &c., Last Will &c., of Henry C. West, dec'd., &c.

Remittitur—January 15, 1943

Be It Remembered, That on the 15th day of May in the year of our Lord one thousand nine hundred and forty-two Emma M. West and others &c., the appellants in this cause, came here unto the Court of Appeals, by Larkin, Rathbone & Perry, and another, their attorneys, and filed in the said Court Notices of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And City Bank Farmers Trust Company, as Trustee &c., and others, the respondents in said cause, afterwards appeared in said Court of Appeals by Mitchell, Taylor, Capron & Marsh and others, their attorneys.

Which said Notices of Appeal and the return thereto, [fols. 263-267] filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Francis J. Mahoney of counsel for the appellants, Mr. Albert Stickney for appellant-respondent West, by Mr. C. Alexander Capron of counsel for the respondent-trustee, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs to the respondent trustee and one bill of costs to the infant appellants, William J. Demorest, Jr., Ann Demorest and Charles Demorest, payable out of the fund.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Surrogates' Court, New York County, there to be proceeded upon according to law.

Therefore, it is considered that the said order be affirmed, with costs, &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Surrogates' Court, New York County, before the Surrogates thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Surrogates' Court before the Surrogates thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, January 15, 1943.

I Hereby Certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

STATE OF NEW YORK,
County of New York, ss.:

I, George Loesch, Clerk of the Surrogate's Court of said County, do hereby certify that I have compared the foregoing copy of Remittitur from Court of Appeals, in the matter of the estate of Henry C. West, deceased, Filed

January 25, 1943, with the original record thereof now remaining in this office, and have found the same to be a correct transcript therefrom and of the whole of such original record.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of New York this 3rd day of May in the year of our Lord one thousand nine hundred and forty-three.

George Loesch, Clerk of the Surrogate's Court.

P-1379-1934. McG/S.

[fol. 268] IN COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

PETITION FOR APPEAL FROM THE COURT OF APPEALS OF STATE OF NEW YORK TO THE SUPREME COURT OF THE UNITED STATES

To the Honorable Irving Lehman, Chief Judge of the Court of Appeals of the State of New York:

William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, by Gerald P. Culkin, as special guardian, your [fol. 269] petitioners, respectfully show:

1. Petitioners are appellants in the above entitled cause.

2. The above named respondent, City Bank Farmers Trust Company, as trustee of the trusts created under the last will and testament of Henry C. West, deceased, on or about the 2nd day of December, 1940, filed in the Surrogate's Court, New York County, State of New York, its account of proceedings as trustee as aforesaid, together with its petition praying for the judicial settlement of its account of proceedings as trustee as aforesaid, and for a judicial construction of said will and instructions and directions.

3. In the proceeding so instituted, your petitioners, by the report and objections of Gerald P. Culkin, as special guardian as aforesaid, asserted the invalidity of subdivision 2 of Section 17-c of the Personal Property Law of the State of New York (Chapter 452 of the Laws of 1940, effective April 13, 1940), on the ground that it was repugnant to

the Fourteenth Amendment to the Constitution of the United States of America, because it deprived his wards as remaindermen of the trust estate of their property without due process of law.

4. By its decree dated September 8, 1941 and entered in the office of the Clerk of the Surrogate's Court of the County of New York on September 9, 1941, said Court sustained the validity of said subdivision 2 of Section 17-c of the Personal Property Law and overruled the contentions [fol. 270] and objections of your petitioners, which were based upon the claimed unconstitutionality of said statute. In and by said decree it was provided that the account of the trustee as aforesaid be settled upon the basis that said subdivision 2 of Section 17-c of the Personal Property Law was constitutional, and the trustee was thereby instructed and directed to govern its conduct as such trustee in the future on the basis that said statute was constitutional.

5. Your petitioners appealed from said decree of said Surrogate's Court to the Appellate Division of the Supreme Court of the State of New York, held in and for the First Judicial Department, which said Appellate Division thereafter unanimously affirmed said decree by its order bearing date and made and entered on the 2nd day of April, 1942, and in and by said order of April 2, 1942 as the same was resettled by the order of said Court bearing date and made and entered April 16, 1942.

6. Your petitioners thereupon appealed to the Court of Appeals of the State of New York from said order, as resettled, in so far as the same sustained the constitutionality of Section 17-c, subdivision 2 of the Personal Property Law of the State of New York.

7. The said Court of Appeals on the 15th day of January, 1943, two judges dissenting, made its final judgment wherein and whereby it was ordered and adjudged that said order of the Appellate Division of the Supreme Court of the State of New York should be affirmed, and on or about the 25th [fol. 271] day of January, 1943, the remittitur of said Court of Appeals, with the record in the said case was filed in the office of the Clerk of the Surrogate's Court, New York County, in accordance with law, and there remains, and by order dated the 5th day of March, 1943, and entered the 6th day of March, 1943, of said Surrogate's Court, the said

order of said Appellate Division and the said judgment of said Court of Appeals were thereby made the orders of said Surrogate's Court.

8. The said Court of Appeals of the State of New York is the highest court of the State of New York in which a decision in this suit could be had.

9. As above stated, in said suit there is drawn in question the validity of a statute of the State of New York, namely, subdivision 2, of Section 17-c of the Personal Property Law, Chapter 452 of the Laws of New York (1940), on the ground that it is repugnant to the Fourteenth Amendment to the Constitution of the United States of America, and the decision and final judgment of the Court of Appeals of the State of New York is in favor of the validity of said statute.

10. In said decision and final judgment certain errors were committed to the prejudice of petitioners which are more fully set forth in the assignment of errors filed herewith.

Wherefore, petitioners pray for the allowance of an appeal from said Court of Appeals of the State of New York, [fol. 272] to the Supreme Court of the United States, in order that the decision and final judgment of the Court of Appeals of the State of New York herein may be reviewed and reversed, and also prays that a transcript of the records, proceedings and papers in this case, duly authenticated by the Clerk of the Surrogate's Court of New York County, State of New York, may be sent to the Supreme Court of the United States, as provided by law.

Dated: New York, N. Y., April 2nd, 1943.

Gerald P. Culkin, Special Guardian for William J. Demorest, Jr., Ann Demorest and Carolyn Demorest.

[fol. 273] In Court of Appeals of the State of New York

[Title omitted]

Assignment of Errors

Now comes William J. Demorest, Jr., Ann Demorest and Carolyn Demorest by their Special Guardian, Gerald P. Culkin, the appellants herein to the Supreme Court of

the United States from the judgment and decision of the [fol. 274] Court of Appeals of the State of New York, and assign as errors the following holdings of said Court of Appeals:

(1) Section 17-c of the Personal Property Law of the State of New York (Chap. 452 of the Laws of New York 1940) as applied to the trust created under the Will of Henry C. West and to its administration, was not repugnant to the Fourteenth Amendment to the Constitution of the United States.

(2) Said statute did not deprive appellants of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, although, said statute required the trustee under the will of Henry C. West, who died prior to the enactment of said statute, to pay to the life beneficiary of said trust, rents from real properties acquired in an attempt to salvage the investment in mortgages thereon theretofore held by said trustee, which rents under the law of the State of New York, existing prior to the enactment of said statute, constituted principal of said trust in which appellants are interested as remaindermen.

(3) Said statute, as applied to mortgages acquired by the trustee of said trust prior to the enactment of said statute, did not violate the rights guaranteed to appellants by said Fourteenth Amendment.

(4) Said statute as applied to rents received, prior to the enactment of said statute, from real property acquired by said trustee in an attempt to salvage investments in mortgages thereon held by said trustee, did not violate the rights guaranteed to appellants by said Fourteenth Amendment.

[fol. 275] (5) Said statute did not violate the rights guaranteed appellants by said Fourteenth Amendment, although it required said trustee, if and when it received from such a parcel of real property during any year, income in excess of expenses of operating said parcel during said year, to pay to the life beneficiary of said trust such excess income for such year, to the extent of three per cent of the principal of the mortgage, although such parcel earned no net income for the whole period from its acquisition by the trustee to the end of such year, and moneys constituting principal of

said trust had been used for the payment of operating expenses of said parcel in prior years.

(6) Said statute did not violate the rights guaranteed to appellants by the Fourteenth Amendment, although, pursuant thereto, the trustee was required to distribute as income certain of the rents which might thereafter be collected from said parcels of real property or from any other parcel of real property which might be acquired on the foreclosure, or by deed in lieu of foreclosure, of a mortgage which was held by the trustee at the time of the enactment of said statute.

Dated: April 2nd, 1943.

Gerald P. Culkin, Special Guardian for William J. Demorest, Jr., Ann Demorest and Carolyn Demorest.

[fol. 276] IN THE COURT OF APPEALS OF THE STATE OF NEW YORK

[Title omitted]

ORDER ALLOWING APPEAL

Upon the petition of William J. Demorest, Jr., Ann Demorest and Carolyn Demorest by their special guardian, Gerald P. Culkin, dated the 2nd day of April, 1943, for an appeal in the above cause to the Supreme Court of the United States from the Court of Appeals of the State of New York, and their assignment of errors and jurisdictional [fol. 277] statement pursuant to Rule 12 of the Rules of the Supreme Court of the United States, and it appearing therefrom and from the records of the above-entitled cause that there was drawn in question in said cause the validity of a statute of the State of New York on the ground that it is repugnant to the Fourteenth Amendment to the Constitution of the United States and that the decision and final judgment of the Court of Appeals is in favor of the validity of said statute;

Now, Therefore, it is

Ordered that said appeal be and the same hereby is allowed as prayed in the petition and that the Clerk of the Surrogate's Court, New York County, State of New York,

shall prepare and certify a transcript of the records and proceedings in the above cause and transmit the same to the Supreme Court of the United States within thirty (30) days from the date hereof; and it is

Further Ordered that the appellants shall give good and sufficient security in the sum of $500, to be approved by the undersigned, that said appellants shall prosecute said appeal to effect and if said appellants fail to make their plea good they shall answer all costs.

Dated: April 3d, 1943.

Irving Lehman, Crief Judge of the Court of Appeals of the State of New York.

[fols. 278-285] Citation in usual form showing service on Appellees, omitted in printing.

[fol. 286] Supreme Court of the United States

Statement and Designation Pursuant to Paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States—Filed April 26, 1943

Now comes William J. Demorest, Jr., Ann Demorest and Carolyn Demorest, by Gerald P. Culkin, Special Guardian, and for a definite statement of the points upon which they intend to rely on this appeal, pursuant to paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, adopt their assignment of errors herein bearing date April 2, 1943; and do hereby designate as the parts of the Record which they think necessary for the consideration thereof by this Court, which are fully set forth in the designation hereto annexed.

Gerald P. Culkin, Special Guardian for Infant Appellants.

Due and timely service of the foregoing statement and designation is hereby admitted, this 23rd day of April, 1943.

[fol. 287] C. Alexander Capron, Charles Anzulo, Attorneys for City Bank Farmers Trust Company, as trustee, appellee. Albert Stickney, Attorney for Emma M. West, appellee. James Morrow, Attorney for Marie Elizabeth West Jones and Elizabeth Frances Jones, appellees.

[fol. 288] SUPREME COURT OF THE UNITED STATES

DESIGNATION PURSUANT TO PARAGRAPH 9 OF RULE 13 OF THE RULES OF THE SUPREME COURT OF THE UNITED STATES

The parties hereto by their undersigned counsel do hereby, pursuant to the provisions of paragraph 9 of Rule 13 of the Rules of the Supreme Court of the United States, designate the parts of the Record which they respectively think necessary for the consideration thereof by this Court, as follows:

(1) opinion of the Court of Appeals of the State of New York;

(2) remittitur of the Court of Appeals of the State of New York;

(3) petition for appeal;

(4) assignment of errors;

(5) order allowing appeal;

(6) citation on appeal; and

(7) the following portions of the Record on Appeal:

(a) notice of appeal of infant appellants to Appellate Division (fols. 10-17);

(b) decree construing will and settling account (fols. 31-135);

[fol. 289] (c) petition for judicial settlement of trustee's account, etc. (fols. 142-188);

(d) excerpts from intermediate account of trustee's proceedings (fols. 190-399) (with deletions as noted upon the annexed copy of said Record on Appeal);

(e) report and objections of special guardian (fols. 400-477) (excluding Schedule A thereto annexed);

(f) will of Henry C. West (fols. 577-591);

(g) opinion of Surrogate, dated March 8, 1941 (fols. 604-684);

(h) notice of appeal to Court of Appeals of infant appellants (fols. 703-708);

(i) order of Appellate Division of affirmance as resettled on April 16, 1942 (fols. 733-744).

Dated: New York, N. Y., April 23rd, 1943.

Gerald P. Culkin, Special Guardian for Infant Appellants; C. Alexander Capron, Charles Anzulo, Attorneys for City Bank Farmers Trust Company, as Trustee, Appellee; Albert Stickney, Attorney for Emma M. West, Appellee; James Morrow, Attorney for Marie Elizabeth West Jones and Elizabeth Frances Jones, Appellees.

[fol. 289a] [File endorsement omitted.]

[fol. 290] SUPREME COURT OF THE UNITED STATES

ORDER NOTING PROBABLE JURISDICTION—May 17, 1943

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

Endorsed on Cover: File No. 47,458. New York, Surrogate's Court, New York County. Term No. 52. William J. Demorest, Jr., Ann Demorest and Carolyn Demorest by Gerald P. Culkin, Their Special Guardian, Appellants, vs. City Bank Farmers Trust Company, as Trustee under the will of Henry C. West, Deceased, et al. Filed April 26, 1943. Term No. 52 O. T. 1943.